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Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280

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NEGOTIATING JURISDICTION: RETROCEDING STATE AUTHORITY OVER INDIAN COUNTRY GRANTED BY PUBLIC LAW 280

Robert T. Anderson*

Abstract: This Article canvasses the jurisdictional rules applicable in American Indian tribal territories—“Indian country.” The focus is on a federal law passed in the 1950s, which granted some states a measure of jurisdiction over Indian country without tribal consent. The law is an aberration. Since the adoption of the Constitution, federal law preempted state authority over Indians in their territory. The federal law permitting some state jurisdiction, Public Law 280, is a relic of a policy repudiated by every President and Congress since 1970. States have authority to surrender, or retrocede, the authority granted by Public Law 280, but Indian tribal governments should be allowed to determine whether and when state jurisdiction should be limited or removed.

The Public Law 280 legislation was approved by Congress in the face of strenuous Indian opposition and denied consent of the Indian tribes affected by the Act The Indian community viewed the passage of Public Law 280 as an added dimension to the dreaded termination policy. Since the inception of its passage the statute has been criticized and opposed by tribal leaders throughout the Nation. The Indians allege that the Act is deficient in that it failed to fund the States who assumed jurisdiction and as a result vacuums of law enforcement have occurred in certain Indian reservations and communities. They contend further that the Act has resulted in complex jurisdictional problems for Federal, State and tribal governments.

S. COMM. ON THE INTERIOR & INSULAR AFFAIRS, 94TH CONG., BACKGROUND REP. ON PUBLIC LAW 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman).

Senator Jackson’s statement accurately described the issues then and now. This Article reviews the legal history of federal-tribal-state relations in the context of Public Law 280 jurisdiction. Washington State has recently taken progressive steps that could serve as the foundation for a national model to remove state jurisdiction as a tribal option. The modern Indian self-determination policy is not advanced by adherence to termination era experiments like Public Law 280. The Article concludes that federal legislation should provide for a tribally-driven retrocession model and makes proposals to that end.

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INTRODUCTION

The United States was founded upon the principle of the “consent of

the governed,”¹ although this proposition has dubious validity with respect to Indian tribes and their citizens. Despite early respect for tribal sovereignty and complete independence from state jurisdiction, the Supreme Court recognized nearly unlimited power in Congress to unilaterally alter the jurisdictional arrangements in tribal territories.² This power over Indian tribes and their territory was exercised without the meaningful consent of the affected tribes, and thus is morally suspect.³ Nevertheless, Congress utilized its authority to assert federal control of criminal matters in Indian country, and later to authorize some state criminal and civil jurisdiction over tribes and their territories.

In 1953, Congress passed Public Law 280 (P.L. 280),⁴ which required six states to assert jurisdiction over Indian country, and opened the door for other states to do the same if they wished.⁵ It provided no role for the affected tribes in state decisions to assert jurisdiction. The unilateral imposition of state jurisdiction has long been regarded as offensive to tribal governments and Indian people because the states, as opposed to the federal government, in many ways remain the “deadliest enemies” of the tribes.⁶ In 1963, Washington State asserted jurisdiction over Indian

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”); WASH. CONST. art. I, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”); *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) (“The Constitution is based on a theory of original, and continuing, consent of the governed.”).

2. Compare *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Georgia has no jurisdiction over non-Indians within Cherokee Reservation), with *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (“[T]ribal lands are subject to Congress’ power to control and manage the tribe’s affairs. But the court must also be cognizant that ‘this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.’”). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (“Long ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a state] can have no force’ within reservation boundaries”) (quoting *Worcester*, 31 U.S. at 520). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01, at 499–514 (Nell J. Newton, Robert Anderson et al. eds., 2005) [hereinafter COHEN]. The 2012 edition of COHEN’S HANDBOOK OF FEDERAL INDIAN LAW was released as this Article was in the final editing stages. While the page numbering has changed, most of the section numbers remain the same and are included here for ease of reference.

3. For a detailed examination of these consent principles, see Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989), and Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012).

4. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

5. *Id.*

6. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the

country and Indian people in a complex fashion that bewilders all who enter the jurisdictional maze.⁷ This assumption of state jurisdiction ignores the democratic consent principle and is inconsistent with modern policies promoting tribal self-determination.⁸ The separate sovereign status of tribes, manifested in the commerce clause of the Constitution⁹ and the foundational decisions of the Supreme Court,¹⁰ supports continued recognition of tribal territories as areas where tribal law is paramount to the exclusion of state law. However, recognizing that Congress and the Supreme Court have in fact frequently authorized the assertion of state authority, Indian tribes are positioned as supplicants to Congress, or the states themselves, when requesting that state jurisdiction over Indian country be withdrawn—or retroceded. Indeed, some states view their jurisdiction over Indian country as the historic norm when in fact it is a relatively recent development.

This Article outlines the legal history of federal-tribal relations, primarily in the criminal jurisdiction context, and examines in some detail the congressional authorization of state jurisdiction over Indian country nationwide and in the Washington-specific context. It reveals the extreme complexity of civil and criminal jurisdiction over Washington's Indian country, and describes recent progressive state legislation that provides tribes with a path to remove state authority, albeit dependent on the good will of the Governor of the state. The Article next reviews several options for adjusting state and tribal jurisdiction in the areas governed by the Indian Child Welfare Act and the Indian Gaming Regulatory Act. It concludes with the recommendation that Congress provide a tribally-driven option for removing state jurisdiction over Indian country. There should be a process of negotiation and information sharing with the states that obtained this non-consensual jurisdiction, but in the end a tribal request for the retrocession of state jurisdiction should be between the affected Indian tribe and the United States. The process should provide an opportunity for interest-based discussions to ensure that the exercise of criminal and civil jurisdiction in Indian country is carried out in a way

people of the states where they [Indians] are found are often their deadliest enemies.”).

7. The Supreme Court upheld this complex arrangement in *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

8. See generally COHEN, *supra* note 2, § 1.07, at 97–113.

9. U.S. CONST. art. I, § 8, cl. 3.

10. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1577–81 (1996) (describing the foundational principles of federal Indian law).

that best serves all citizens.

Part I of this Article provides historical context for the modern jurisdictional rules applicable to Indian tribes and their territory. Part II explains the baseline criminal and civil jurisdictional rules that operate in Indian country. Part III outlines the manner and scope of P.L. 280's jurisdictional grant to the states. Part IV reviews how Washington asserted jurisdiction under P.L. 280, and reveals the complex jurisdictional scheme. Part V details the state legislation that became effective in June 2012, and established a process for the elimination of some or all state jurisdiction upon the request of an affected Indian tribe. Part VI explores the legal and policy issues implicated in what is essentially a negotiation of federal, tribal, and state sovereignty under P.L. 280's framework. It also suggests approaches to federal legislation to guide the process in a manner consistent with modern tribal self-determination policy.

I. INDIAN TRIBES ARE SOVEREIGNS RECOGNIZED UNDER
FEDERAL LAW AND FREE OF STATE JURISDICTION
ABSENT TRIBAL AGREEMENT OR FEDERAL LAW TO THE
CONTRARY

The Indian Commerce Clause was included in the Constitution to center authority over Indian affairs in Congress and to deny state jurisdiction within Indian country absent some delegation from Congress or common law rule. In *Worcester v. Georgia*,¹¹ the Court rejected Georgia's assertion of criminal jurisdiction over a non-Indian present within the Cherokee Nation without a license required by state law.¹² Chief Justice Marshall explained that Indian tribes were quasi-independent sovereigns not subject to state jurisdiction.¹³ Now, Indian tribes, the federal government, and the states share authority within Indian country as a result of treaties, federal statutes, and federal common law. The modern definition of "Indian country," found in the federal criminal code, encompasses Indian reservations, allotments, and

11. 31 U.S. (6 Pet.) 515 (1832).

12. *Id.* at 559–61; see generally COHEN, *supra* note 2, § 6.01[2], at 501–03.

13. "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Worcester*, 31 U.S. at 559–61. Earlier, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court ruled that the Cherokee Nation was not a foreign nation within the meaning of Article III of the Constitution and thus could not invoke the Supreme Court's original jurisdiction to challenge Georgia's laws purporting to regulate the Nation.

dependent Indian communities.¹⁴ The Supreme Court later ruled that this definition is also generally applicable in the civil context,¹⁵ though there are many other definitions applicable in particular situations.¹⁶

Treaty negotiations with western tribes took place as the United States gained new territory from foreign nations. Property used and occupied by Indian nations could not be transferred except by treaties or other agreements ratified by Congress.¹⁷ These tribal property rights were based on aboriginal Indian occupancy¹⁸ and were said to be as “sacred as the fee simple of the whites.”¹⁹ Three hundred and sixty-seven treaties with Indian tribes were negotiated and ratified between 1778 and 1871.²⁰ The treaties furthered peaceful relations with the tribes and provided access to vast areas for non-Indian settlement.²¹ The United States recognized permanent reservations, and, primarily in the upper-Midwest and Pacific Northwest, the tribes reserved off-reservation hunting and fishing rights.²² However, when non-Indians wanted to settle the land previously “guaranteed” to the tribes by treaty, most of the “permanent” tribal homelands were drastically reduced in size.²³

14. 18 U.S.C. § 1151 (2006).

15. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

16. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1293 (D.C. Cir. 2000) (surveying various definitions of “reservation”).

17. 25 U.S.C. § 177 (2006).

18. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *see also* COHEN, *supra* note 2, § 15.04[2], at 971 (“The Court described the tribal interest in land variously, as a ‘title of occupancy,’ ‘right of occupancy,’ and right of possession . . .”). The common shorthand term for these property rights is “aboriginal title.” *See Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233–34 (1985); *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 669 n.5, 676 (1974).

19. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). Of course, the Supreme Court in 1955 created a gaping hole in the fabric of aboriginal title when it held that “unrecognized Indian title” in southeast Alaska was not protected by the Just Compensation Clause of the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); *see* Joseph Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in *INDIAN LAW STORIES* 229 (Carole Goldberg et al. eds., 2011).

20. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* 1 (1994).

21. *See, e.g.*, Act of June 5, 1850, ch. XVI, 9 Stat. 437 (authorizing the President “to appoint one or more commissioners to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; also, for obtaining their assent and submission to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories and of the United States”).

22. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

23. For example, Congress confiscated the Black Hills of South Dakota through an “agreement” that amounted to a taking of the tribe’s recognized title to the land in violation of the Fifth Amendment. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 377–83 (1980).

The promise of permanent homelands also faded during the 1850s when the Senate ratified treaties with tribes that authorized the breakup of tribal lands into individual “allotments.”²⁴ The federal retreat from the consent model increased when Congress ended treaty-making in 1871.²⁵ The policy of ending the reservation system culminated with the adoption of the General Allotment Act,²⁶ which reduced the Indian land base from 156 million acres in 1881 to approximately forty-eight million acres in 1934.²⁷ Congress returned to the public domain lands that were considered “surplus” to Indian needs.²⁸ While previous reservations were generally under exclusive tribal ownership, the new policies allowed an influx of non-Indians within reservation boundaries. This resulted in a checkerboard pattern of land ownership within reservations and introduced many of today’s vexing jurisdictional problems.²⁹

Congress returned to earlier policies that supported protection of Indian land with the adoption of the Indian Reorganization Act (IRA) in 1934.³⁰ The IRA “halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands.”³¹ This return to support of tribal self-government and a secure Indian land base was short-lived, however, as less than twenty years later, Congress adopted a resolution calling for the

24. See Treaty with the Duwamish et al., art. 7, 12 Stat. 927 (1855); Treaty with the Omahas, art. 1, 10 Stat. 1043 (1854).

25. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as 25 U.S.C. § 71 (2006)) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”). Existing treaty rights were not impaired. *Id.* The United States continued to negotiate agreements with Indian tribes, which were then ratified by Congress. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908) (construing agreement with the tribes of the Fort Belknap Reservation).

26. General Allotment (Dawes) Act of 1887, 24 Stat. 388. The Dawes Act gave the President authority to divide communal tribal lands into individual parcels to be held by tribal members. These “allotments” were protected from taxation and could not be sold without the consent of the Secretary of the Interior for a period of twenty-five years. After that they were to be held in fee simple status. 25 U.S.C. § 348 (2006). See generally COHEN, *supra* note 2, § 1.04, at 75–84.

27. COHEN, *supra* note 2, § 1.04, at 78–79.

28. See, e.g., *Solem v. Bartlett*, 465 U.S. 463 (1984).

29. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

30. Wheeler-Howard Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–79); see COHEN, *supra* note 2, § 1.05, at 86–88.

31. *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). Today, Indian land holdings are estimated at 55.4 million acres, with approximately 44.4 million owned by tribes and eleven million held in the form of individual allotments. COHEN, *supra* note 2, § 15.01, at 965, § 16.03[4][a], at 1048.

“termination” of the federal-tribal relationship with certain Indian tribes.³² Although the termination period quickly fell into disfavor, its short tenure resulted in the end of the government-to-government relationship between the United States and over seventy federally recognized Indian tribes, and transferred jurisdiction over those tribes to the states.³³ This state control turned the historic federal-tribal relationship on its head and states began aggressively to assert jurisdiction over Indian country through laws such as P.L. 280.³⁴ As such, states began to view their claims of jurisdiction as the norm and viewed the presence of tribal reservations as unwanted jurisdictional enclaves that states opposed on principle, without examining the bona fide interests of the tribes or the state itself.³⁵

The presence of substantial numbers of non-Indians within Indian country and their presence on non-tribal land increased the states’ desires to assert jurisdiction over their non-Indian citizens in Indian territories. Recall, however, that it was Georgia’s assertion of jurisdiction over a non-Indian’s presence on the Cherokee Reservation that resulted in the categorical rule that states lacked jurisdiction within Indian country.³⁶ Changes in federal law were necessary for states to accomplish their end. With Indian peoples no longer physically separated from the non-Indian population, and their reservations now included within the exterior boundaries of many states, local racism and jurisdictional jealousy combined to increase efforts to reduce federal protection of tribal autonomy. Nowhere is this more true than in the context of criminal jurisdiction—the focus of P.L. 280. Before launching into the P.L. 280 issues that are the focus of this Article, a review of general criminal jurisdiction rules is necessary.

32. H.R. Con. Res. 108, 83d Cong. (1953) (directing the Secretary of the Interior to recommend tribes for termination); see COHEN, *supra* note 2, § 1.06, at 95. In general, “[termination] would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled.” Richard M. Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), H.R. Doc. 91-363, at 1. *But see* Menominee Tribe v. United States, 391 U.S. 404 (1968) (termination of Menominee Indian Tribe did not abrogate tribal rights to hunt and fish free of state regulation).

33. See COHEN, *supra* note 2, § 1.06, at 95.

34. See *infra* Part III.

35. CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 249 (2005).

36. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

II. THE EVOLUTION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY FROM EXCLUSIVE TRIBAL CONTROL TO AN INCREASED STATE ROLE IS INCONSISTENT WITH SELF-DETERMINATION AND CONSENT PRINCIPLES

Criminal jurisdiction in Indian country evolved from early acknowledgement of exclusive tribal jurisdiction over persons within aboriginal territories, to a gradual assertion of paramount federal authority over crimes involving tribal members and non-Indians. The federal government initially took a hands-off approach to intra-tribal disputes, but as the United States shifted toward assimilation, it asserted jurisdiction over major crimes between tribal members. Federal domination of criminal jurisdiction increased over time and was accompanied in 1968 by the reduction of tribal authority to impose punishments on criminal offenders in tribal court proceedings.³⁷ While there are many problems with the assertion and implementation of federal jurisdiction and policies, most evidence points to the conclusion that the exercise of state jurisdiction in the criminal law arena has made a bad situation worse.³⁸ Before exploring these issues more deeply, it is useful to set out the basic scheme governing criminal jurisdiction in Indian country.

The term “Indian country” is the geographic touchstone for application of the Indian law jurisdictional rules.³⁹ The modern definition was adopted in 1948 to take policy changes and various Supreme Court decisions into account.⁴⁰ Prior to 1948, the definitions of Indian country were supplied by Congress,⁴¹ or the Supreme Court as a matter of common law.⁴² In *United States v. John*,⁴³ the Court explained that while “earlier cases had suggested a more technical and limited

37. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006) (giving an insightful and descriptive critique of the adverse effects of federal policies in the criminal justice area). Tribal sentencing authority was limited to six months in jail and a \$500 fine per offense, Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968), and now stands at one year in jail and a \$10,000 fine, with the option to increase the penalties to three years per offense with a \$15,000 fine, provided certain conditions are met. 25 U.S.C. § 1302 (2006).

38. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 200 (2012) [hereinafter CAPTURED JUSTICE].

39. See generally COHEN, *supra* note 2, § 3.04, at 182–99.

40. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (2006)).

41. Act of June 30, 1834, ch. 161 § 1, 4 Stat. 729.

42. *United States v. John*, 437 U.S. 634, 649 n.18 (1978) (citing *Bates v. Clark*, 95 U.S. 204 (1877)); see COHEN, *supra* note 2, § 3.04[2][b], at 184–88.

43. 437 U.S. 634.

definition of ‘Indian country,’” it was a “more expansive scope of the term that was incorporated in the 1948 revision of Title 18.”⁴⁴ The current statute defines Indian Country as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation*, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same*.⁴⁵

This statute’s most often applied section is that dealing with “reservation” Indian country. Of particular importance here, the reservation component expressly includes lands patented in fee simple to non-Indians and state rights-of-way within reservations as Indian country.⁴⁶ The Supreme Court noted that the reason for the unified treatment of all land within reservations was to facilitate effective law enforcement by avoiding the need to determine land status on a tract-by-tract basis to determine the bounds of federal criminal jurisdiction.⁴⁷

A. *Federal Jurisdiction over Indians in Indian Country Increased as Indian Nations Succumbed to Federal Domination*

Congress first treaded lightly when passing criminal laws affecting Indians and their territory, but gradually increased federal power as the non-Indian population grew. The Trade and Intercourse Act of 1790 made crimes by non-Indians against Indian victims federal offenses.⁴⁸ Offenses by Indians against non-Indians were generally dealt with through diplomatic channels in the early days of federal-tribal relations. In 1817, Congress adopted the first version of the Indian Country Crimes Act (ICCA), which made offenses by non-Indians and Indians in Indian territory federal offenses.⁴⁹ The ICCA extends federal criminal laws that apply to areas of exclusive federal jurisdiction, such as military bases and national parks, to Indian country.⁵⁰ The ICCA has two

44. *Id.* at 649 n.18.

45. 18 U.S.C. § 1151 (2006) (emphasis added).

46. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (rejecting the State of Washington’s argument that the words “notwithstanding the issuance of any patent” extends only to land patented to an Indian).

47. *Id.* at 358–59.

48. Trade and Intercourse Act of 1790, ch. 34, § 5, 1 Stat. 137, 138.

49. Act of Mar. 3, 1817, § 1, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (2006)).

50. The geographic jurisdictional reach of the statute is set out in 18 U.S.C. § 7. The federal

important exceptions. First, it does not cover Indian-on-Indian crimes.⁵¹ Second, if an Indian has first been punished for a crime under tribal law, he or she may not be prosecuted under the ICCA for the same offense.⁵² The ICCA also incorporates state law crimes under the Assimilative Crimes Act (ACA)⁵³ to fill gaps in the federal criminal code.⁵⁴ Thus, if a crime committed in Indian country is not covered directly by the federal criminal code for federal enclaves, a federal prosecutor may apply state criminal law through the ICCA. The second source of modern criminal jurisdiction in Indian country is the Major Crimes Act (MCA),⁵⁵ which defines sixteen crimes as federal offenses when committed by Indians (whether the victims are Indian or not).⁵⁶ The MCA was passed in response to the Supreme Court's decision in *Ex Parte Crow Dog*.⁵⁷ There, the Court ruled that the federal government was barred from prosecuting an Indian for the murder of another tribal member because of the ICCA's Indian-on-Indian exception.⁵⁸ The incident had been dealt

crimes made applicable include most felonies and a wide variety of offenses related to the subject matter of federal enclaves. *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft); 18 U.S.C. § 2251 (sexual exploitation of children in federal territories).

51. 18 U.S.C. § 1152. Victimless crimes such as adultery also are not covered by the ICCA. *United States v. Quiver*, 241 U.S. 602, 605–06 (1916); *see* COHEN, *supra* note 2, § 9.02[1][c][iii], at 735–36 (citing and criticizing several lower court cases that have not followed *Quiver*).

52. 18 U.S.C. § 1152. An exception for Indians who had been punished by the local law of their tribe was added in 1854. Act of Mar. 27, 1854, § 3, 10 Stat. 270.

53. 18 U.S.C. § 13.

54. *See Williams v. United States*, 327 U.S. 711, 719 (1946) (assuming that the ACA was subsumed within the ICCA); COHEN, *supra* note 2, § 9.02[1][c][ii], at 734.

55. 18 U.S.C. § 1153.

56. The Major Crimes Act reads:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

57. 109 U.S. 566 (1883); *see* SIDNEY L. HARRING, *CROW DOG'S CASE, AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 134–40 (1994); COHEN, *supra* note 2, § 9.02[1][e] at 742.

58. *Ex Parte Crow Dog*, 109 U.S. at 572. While the ICCA and the MCA provide the substantive law for federal prosecutions in Indian country, at the sentencing stage the United States Sentencing Guidelines serve as a guide to the court. 18 U.S.C. § 3551 (2006); *see* COHEN, *supra* note 2, § 9.02[2][h], at 747–49. “The Federal Death Penalty Act of 1994 conditionally eliminated the death

with under traditional Brule Sioux law, which called for a tribal council meeting, family meetings with a peacemaker, and restitution in order to restore order to the tribal community.⁵⁹ The ethnocentric non-Indian view was that such tribal justice systems were inadequate and western notions of criminal punishment should be imposed on tribes, and thus the MCA became law.

In addition, some courts have held that the United States has jurisdiction over some general federal criminal laws within Indian country.⁶⁰ These appellate court rulings have been criticized because Congress has not expressly made such offenses applicable to Indians in Indian country. Just as the MCA was necessary to reach specifically enumerated Indian-on-Indian offenses, it seems that general federal statutes should not apply in Indian country unless Congress has expressly stated its intention to do so. However, these federal appeals courts appear in agreement that such general crimes have a nationwide scope and therefore should reach into Indian country.

B. Tribes Retain Inherent Jurisdiction over Indians

Indian tribes have criminal jurisdiction over their own members and other Indians who are members of federally recognized tribes.⁶¹ Tribal sentencing authority, however, was severely limited by the Indian Civil Rights Act (ICRA), which provides that tribes may impose only a sentence of up to one year in jail and/or \$5000 per offense.⁶² The Tribal Law and Order Act of 2010 amended this to provide that subject to certain federal standards, tribes may sentence an Indian defendant to up

penalty for Native American defendants prosecuted under the Major Crimes Act or the General Crimes Act, subject to the penalty being reinstated by a tribe's governing body." United States v. Gallaher, 608 F.3d 1109, 1110 (9th Cir. 2010) (citing 18 U.S.C. § 3598).

59. See HARRING, *supra* note 57, at 110, 119, 141.

60. See, e.g., United States v. Smith, 387 F.3d 826, 829 (9th Cir. 2004) (holding that 18 U.S.C. § 1513(b), which bars retaliation against a federal witness, applies to crimes committed by and against Indians in Indian country); United States v. Begay, 42 F.3d 486, 499 (9th Cir. 1994) (holding that the federal conspiracy statute, 18 U.S.C. § 371, "is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country").

61. United States v. Lara, 541 U.S. 193, 210 (2004) (upholding congressional restoration of tribal criminal jurisdiction over non-member Indians); United States v. Wheeler, 435 U.S. 313, 331-32 (1978) (recognizing inherent tribal jurisdiction over tribal members).

62. Indian Civil Rights Act, Pub. L. No. 90-284, § 202, 82 Stat. 77 (1968) (tribes were originally limited to imposing penalties of six months in jail and a \$500 fine per offense) (codified as amended at 25 U.S.C. § 1302 (2006)). The 1986 amendments increased the penalties. Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986).

to three years in jail and impose a \$5000 fine per offense.⁶³

Although the Supreme Court has never decided the issue,⁶⁴ tribes retain concurrent criminal jurisdiction over Indians with the federal government for crimes governed by the MCA and ICCA.⁶⁵ In *United States v. Wheeler*,⁶⁶ the Court held that the Double Jeopardy Clause of the Constitution did not bar federal prosecution for an offense after a tribal prosecution based on the identical conduct.⁶⁷ The Court noted that “tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe’s jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests.”⁶⁸ Because tribal powers may not be limited by implication, it seems apparent that concurrent tribal jurisdiction over matters covered by federal criminal statutes is not preempted.⁶⁹

In *Oliphant v. Suquamish Tribe*,⁷⁰ the Supreme Court ruled that Indian tribes have no criminal jurisdiction over non-Indian defendants on the ground that such jurisdiction had been divested through the tribes’ incorporation into the United States, various other acts of Congress, and the “shared assumptions” of the three branches of the federal government.⁷¹ Despite the lack of jurisdiction, tribal police do have “authority to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until

63. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(a), 124 Stat. 2279 (relevant portions codified at 25 U.S.C. §§ 1302 (a)(7), (b) (Supp. IV 2010)). Tribes are permitted to stack sentences for separate offenses up to a total of nine years and \$15,000 in fines. *Id.*

64. *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990).

65. *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995).

66. 435 U.S. 313.

67. *Id.*; see also *Talton v. Mayes*, 163 U.S. 376 (1896) (tribal prosecution for murder not subject to the dictates of the Bill of Rights on the ground that tribes are separate sovereigns and not arms of the federal government).

68. *Wheeler*, 435 U.S. at 332.

69. See COHEN, *supra* note 2, § 2.02, at 119–20.

70. 435 U.S. 191 (1978).

71. *Id.* at 210–11. For a critical analysis of the historical record relied upon by the Court, see Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979). The *Oliphant* ruling was extended by the Supreme Court to bar tribal jurisdiction not only over non-Indians, but also over Indians who are members of other tribes. *Duro v. Reina*, 495 U.S. 676 (1989). Congress reversed the Court’s ruling when it amended the Indian Civil Rights Act to restore the inherent criminal jurisdiction of all federally recognized tribes over “all Indians” in the governing tribe’s territory. 25 U.S.C. § 1301(2) (2006).

that person can be turned over to state authorities for charging and prosecution.”⁷² Washington State law provides for cross-deputization agreements, permitting tribal law enforcement officials to enforce applicable state law.⁷³ Tribes may also cross-deputize state and federal officers under tribal laws if they wish.

C. *States Have No Jurisdiction over Criminal Matters Involving Indians*

State jurisdiction over Indian country is precluded by the inherent sovereignty of Indian nations,⁷⁴ and is also preempted by the MCA and the ICCA.⁷⁵ Similarly, states lack jurisdiction over crimes by non-Indians when the victim is an Indian because of the same principles. On the other hand, by common law rule, states have jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country.⁷⁶ States also appear to have jurisdiction over victimless crimes committed by non-Indians when no federal or tribal interests are

72. *State v. Schmuck*, 121 Wash. 2d 373, 376, 850 P.2d 1332, 1333 (1993); *cf. State v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997) (“We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.”); *see also State v. Eriksen (Eriksen III)*, 172 Wash. 2d 506, 259 P.3d 1079 (2011) (holding that the stop-and-detain rule does not extend to tribal police officers who stop and detain non-Indians on state land outside of an Indian reservation, even when the stop is based on probable cause occurring within reservation boundaries); Kevin Naud, Jr., Comment, *Fleeing East from Indian Country: State v. Erickson and Tribal Inherent Sovereign Authority to Continue Cross-Jurisdictional Fresh Pursuit*, 87 WASH. L. REV. 1251, 1272–74 (2012) (discussing *Eriksen III*).

73. *See* WASH. REV. CODE § 10.92.020 (2010). The Washington State statute provides that:

Tribal police officers under subsection (2) of this section shall be recognized and authorized to act as general authority Washington peace officers. A tribal police officer recognized and authorized to act as a general authority Washington peace officer under this section has the same powers as any other general authority Washington peace officer to enforce state laws in Washington, including the power to make arrests for violations of state laws.

Id. § 10.92.020(1). The second section of the statute contains provisions related to training and insurance requirements and concludes with a provision mandating arbitration if an affected county and tribe cannot reach a cross-deputization agreement after a tribal request that conforms to the statutory requirements. *Id.* § 10.92.020(2). Both tribal and state police may be certified to enforce federal law within Indian country. 25 U.S.C. § 2804 (2006). State officers may be so authorized only if the affected Indian tribe does not object. *Id.* § 2804(c).

74. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *cf. Ex Parte Crow Dog*, 109 U.S. 556 (1883) (federal government had no jurisdiction to prosecute Indian for murder of another Indian absent affirmative grant from Congress).

75. COHEN, *supra* note 2, § 9.03[1], at 754.

76. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

implicated.⁷⁷

Congress has used its power under the Indian Commerce Clause to authorize the exercise of state jurisdiction in haphazard fashion. Thus, New York,⁷⁸ Iowa,⁷⁹ and Kansas⁸⁰ all were authorized to exercise some jurisdiction over Indian country in those states.⁸¹ These statutes were the precursors to the most sweeping authorization of state jurisdiction ever: Public Law 280, which was adopted in the midst of the federal termination era. In addition, a number of modern land claims settlement acts contain provisions that place criminal law enforcement authority largely in the hands of state authorities, while sometimes preserving concurrent federal and tribal jurisdiction.⁸²

77. COHEN, *supra* note 2, § 9.03[1], at 754–55. These are crimes that do not involve an Indian victim, individual Indian defendant, or tribal property.

78. Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (2006)) (grant of criminal jurisdiction over all reservations in state, but subject to savings clause excepting state authority over “hunting and fishing rights as guaranteed them by agreement, treaty, or custom,” and preempting any state fish and game licensing requirements).

79. Act of June 30, 1948, ch. 759, 62 Stat. 1161 (grant of criminal jurisdiction over Sac and Fox Reservation; concurrent federal jurisdiction reserved).

80. Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (2006)) (grant of criminal jurisdiction over all reservations, including trust and restricted allotments in Kansas; concurrent federal jurisdiction reserved); *see* *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (construing the Kansas grant as including concurrent state jurisdiction over crimes covered by the federal Major Crimes Act).

81. For a discussion of these statutes and authorities construing them, *see* COHEN, *supra* note 2, § 6.04, at 581–84.

82. *See, e.g.*, Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, 108 Stat. 4632 (codified at 25 U.S.C. § 1776); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C. § 1771) (state granted jurisdiction with no mention of tribal or federal jurisdiction); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C. §§ 1751–60) (state granted jurisdiction with no mention of tribal or federal jurisdiction); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721–35) (state granted jurisdiction subject to exception for internal matters), *construed in* *Penobscot Nation v. Fellerer*, 164 F.3d 706 (1st Cir. 1999); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C. §§ 1701–16) (state granted jurisdiction).

III. P.L. 280 AUTHORIZED STATE CRIMINAL AND SOME CIVIL JURISDICTION IN INDIAN COUNTRY IN A MANNER INCONSISTENT WITH MODERN SELF-DETERMINATION POLICIES

A. *The Passage of P.L. 280 Marked a Retreat from the Policy of Support for Tribal Institutions Under the IRA*

After the encouragement and tangible support provided to Indian tribes in the 1934 Indian Reorganization Act, Congress quickly lapsed into a policy of assimilation and eventually into a policy of selectively terminating the government-to-government relationship with Indian tribes.⁸³ In 1953 Congress passed House Concurrent Resolution 108, which set a goal of removing federal jurisdiction over Indian country and making Indians subject to general state law as quickly as possible.⁸⁴ Congress implemented this policy by enacting statutes applicable to individual tribes and set out plans for effecting the termination of the federal-tribal relationship.⁸⁵ Another prong of the termination policy came through P.L. 280,⁸⁶ which required six states to assert criminal jurisdiction and some civil jurisdiction over the Indian country located within those states.⁸⁷ In addition, Congress provided a disclaimer of any

83. COHEN, *supra* note 2, §§ 1.05–.06, at 85–97; *see also* WILKINSON, *supra* note 35, at 1–89.

84. H.R. Con. Res. 108, 83d Cong. (1953). Although this policy was eroded in the 1960s and was repudiated by President Nixon in 1970, Congress did not formally revoke it until 1988. 25 U.S.C. § 2501(f) (“Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress and any policy of unilateral termination of Federal relations with any Indian nation.”). *See generally* COHEN, *supra* note 2, § 1.07, at 97–113.

85. The court in *Ute Distribution Corp. v. United States*, 938 F.2d 1157, 1159 n.1 (10th Cir. 1991), observed that:

These tribes included: the Southern Paiutes of Utah (Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (formerly codified at 25 U.S.C. §§ 741–760); the Alabama and Coushatta Indians of Texas (Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. §§ 721–728); sixty-one tribes and bands in western Oregon (Act of Aug. 13, 1954, ch. 773, 68 Stat. 724 (repealed 1977 with respect to Siletz Tribe) (codified as amended at 25 U.S.C. §§ 691–708); the Klamaths of Oregon (Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed 1978 with respect to Modoc Tribe) (codified as amended at 25 U.S.C. §§ 564–564x); the Menominee Tribe of Wisconsin (Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891–902); and the mixed-blood Utes of the Uintah and Ouray Reservations in Utah).

Id.

86. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)).

87. Congress also provided that the Major Crimes Act and Indian Country Crimes Act would no longer be applicable in the six mandatory states. 18 U.S.C. § 1162. In 2010, however, Congress gave Indian tribes authority to request the application of those statutes by making a request to the Attorney General. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221(b), 124 Stat. 2272 (codified at 18 U.S.C. § 1162(d) (Supp. I 2010)). Regulations implementing the statute can be found

effect on any trust property, water rights, or hunting, trapping or fishing rights, including tribal regulatory power over such activities.⁸⁸

Finally, Congress also included a provision authorizing other states to unilaterally assert criminal and/or civil jurisdiction over Indian country.⁸⁹ The fact that this provision did not include a role for affected tribes in the process has long been viewed as morally and politically unacceptable by Indian tribes.⁹⁰ President Eisenhower expressed great

at 28 C.F.R. § 50.25 (2012). In the preamble to the Rule, the Justice Department stated that: “As indicated above, the Department concludes that the United States has concurrent jurisdiction over General Crimes Act and Major Crimes Act violations in areas where States have assumed criminal jurisdiction under ‘optional’ Public Law 280.” 76 Fed. Reg. 76,037, 76,039 (Dec. 6, 2011). The Eighth Circuit reached the same conclusion in *United States v. High Elk*, 902 F.2d 660 (8th Cir. 1990). *But see* *United States v. Burch*, 169 F.3d 666 (10th Cir. 1999) (holding that statute incorporating voluntary assumption component of P.L. 280 preempted federal jurisdiction under MCA). *United States v. Johnson*, No. CR80-57MV (W.D. Wash. May 13, 1980) (holding that the Major Crimes Act did not apply to prosecution over which Washington State assumed jurisdiction). The United States appealed, but withdrew its appeal before a decision on the merits. *United States v. Johnson*, No. 80-1391 (July 23, 1980). For a critical examination of the issue, see COHEN, *supra* note 2, § 6.04[3][d], at 567–68.

88. The criminal jurisdiction disclaimer provides in full:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

18 U.S.C. § 1162(b) (2006).

The civil jurisdiction counterpart provides:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b) (2006).

89. Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 (“The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.”).

90. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 544–46 (1975); *see* DAVID M. ACKERMAN, CONG. RESEARCH SERV., *Background Report on Public Law 280*, at 22 (94th Cong. 1st Sess. (1975) [hereinafter *Public Law 280*] (describing opposition of the Colville and Yakima Tribes of Washington because of “a ‘fear of inequitable treatment in the State courts and fear that extension of State law to their reservations would result in the loss of various rights’”); *see also* *Washington v. Confederated*

concern over the law's failure to obtain tribal consent to the intrusion on tribal jurisdiction in his signing statement.⁹¹ Although Congress ultimately approved a provision in the 1968 Indian Civil Rights Act that required a state to obtain tribal consent before adopting P.L. 280,⁹² seven states had already unilaterally asserted some measure of jurisdiction.⁹³

B. P.L. 280's Grant of Criminal and Civil Jurisdiction Did Not Include Civil Regulatory Authority

The primary focus of P.L. 280 was to grant states criminal jurisdiction over Indian country. The legislative history makes it clear that “the foremost concern of Congress at the time of enacting PL-280 was lawlessness on the reservations and the accompanying threat to Anglos living nearby.”⁹⁴ States did not gain any authority to regulate civil activities in Indian country through P.L. 280⁹⁵ because Congress did not extend the full panoply of civil regulatory powers to the states, but only intended to afford Indians a judicial forum to resolve disputes among themselves and with non-Indians.⁹⁶ This principle is clear from *Bryan v. Itasca County*,⁹⁷ in which the county attempted to tax non-trust property within a reservation under the guise that P.L. 280 granted it authority to do so. The Court rejected Itasca County's argument that the grant of civil jurisdiction included the authority to impose taxes and regulations on non-trust property within Indian country.⁹⁸

This interpretation of P.L. 280 was reinforced in the landmark case of *California v. Cabazon Band of Mission Indians*.⁹⁹ In *Cabazon*, California sought to regulate bingo and various poker games on reservations under P.L. 280's *criminal* provisions. State law permitted

Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 489 n.33 (1979) (noting Yakima opposition to state jurisdiction since 1952).

91. CAPTURED JUSTICE, *supra* note 38, at 11 (citing CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1996)).

92. See Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 247, 247 (Carpenter, Fletcher, Riley eds., 2012) [hereinafter *Searching for an Exit*].

93. COHEN, *supra* note 2, § 6.03[a], at 544–45 n.308.

94. *Public Law 280*, *supra* note 90, at 541.

95. *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976).

96. *Bryan*, 426 U.S. at 388–91.

97. 426 U.S. 373. For a history of the litigation, see Kevin K. Washburn, *How a \$147 County Tax Notice Helped Bring Tribes More Than \$200 Billion in Indian Gaming Revenue: The Story of Bryan v. Itasca County*, in *INDIAN LAW STORIES* 421 (Carole Goldberg et al. eds., 2011).

98. *Id.* at 390.

99. 480 U.S. 202 (1987).

bingo and other games, but only for charitable purposes and subject to regulations with which the tribal gaming operators refused to comply.¹⁰⁰ California sought to enforce these regulations by punishing these violators with criminal penalties.¹⁰¹ When determining whether California had jurisdiction to regulate gaming under the criminal provisions of P.L. 280, the Court strongly reinforced its holding in *Bryan*.¹⁰² The Court ruled that “it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.”¹⁰³ California argued that because it imposed criminal penalties for violations of its regulations, the case should not be analyzed under *Bryan*’s (or P.L. 280’s) civil jurisdiction rules. The Court rejected California’s plea by drawing a distinction between state “criminal/prohibitory” laws and state “civil/regulatory” laws.¹⁰⁴ Conduct that is actually prohibited as a matter of state law and policy falls on the criminal side of P.L. 280’s grant, while activity that is generally permitted but regulated through state laws and rules is not within P.L. 280’s grant of civil jurisdiction.¹⁰⁵ The Court rejected California’s argument that because criminal penalties attached to the violation of the state regulations, it should be regarded as prohibited criminal conduct and thus subject to state jurisdiction under P.L. 280. After examining the state’s gaming laws, the majority concluded that “in light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.”¹⁰⁶ The Court thus eliminated the argument that a state could simply attach criminal penalties to a regulatory program to enforce the regulations pursuant to P.L. 280.

The Court’s test is easy to apply in most cases.¹⁰⁷ For example, there is no doubt that serious crimes such as murder, assault, robbery and the like all fall on the criminal/prohibitory side of the line. In some cases, states have explicitly classified certain offenses as civil infractions rather

100. *Id.* at 205–06.

101. *Id.*

102. *See generally id.*

103. *Id.* at 208.

104. *Id.* at 209.

105. *Id.* at 209–10 (footnote omitted).

106. *Id.* at 211.

107. *See generally* COHEN, *supra* note 2, § 6.04[3][b], at 546–53.

than criminal offenses. This distinction was critical in an action brought by the Confederated Tribes of the Colville Reservation where the Ninth Circuit considered Washington's assertion of civil and criminal jurisdiction over activities on highways within Indian country.¹⁰⁸ The court ruled that because the state legislature decriminalized the traffic code, those civil regulations could not be enforced through P.L. 280.¹⁰⁹

Because state regulatory authority is not sanctioned by P.L. 280, what is left is the application of state rules of decision in civil litigation.¹¹⁰ While state taxation, zoning, and workers' compensation laws are regulatory in nature and thus easily identified as outside of P.L. 280's grant of civil jurisdiction,¹¹¹ other laws have proved difficult to classify. For example, a dependency proceeding leading to the involuntary termination of parental rights was characterized by the Ninth Circuit as a non-regulatory procedure akin to the adjudication of a private civil dispute over a contract or tort claim, thus falling within P.L. 280's ambit.¹¹² But the Wisconsin Attorney General reached the opposite conclusion in an opinion years earlier.¹¹³ The Ninth Circuit's ruling rested on the notion that a dependency proceeding is a dispute about the status of a private individual—a child—and that “child dependency proceedings are more analogous to the ‘private legal disputes’ that fall under a state’s Public Law 280 jurisdiction than to the regulatory regimes at issue in *Bryan and Cabazon*.”¹¹⁴ This reasoning ignores the extreme coercive consequence of a dependency adjudication, namely removal of a child from the custody of a parent, and the possible

108. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991).

109. *Id.* at 148; *see also* COHEN, *supra* note 2, § 6.04[3][b], at 549 n.346.

110. State law is “applicable only as it may be relevant to private civil litigation in state court.” *Cabazon*, 480 U.S. at 208. Rules of decision can be the common law rules utilized in private tort or contract litigation, or the statutes that provide substantive law for the resolution of such disputes.

111. *See* COHEN, *supra* note 2, § 6.04[3][b], at 548; *cf.* *Gobin v. Snohomish Cnty.*, 304 F.3d 909 (9th Cir. 2002) (holding that county lacked zoning authority over Indian fee land within Indian country).

112. *Doe v. Mann*, 415 F.3d 1038, 1058–59 (9th Cir. 2005). In *Comenout v. Burdman*, 84 Wash. 2d 192, 525 P.2d 217 (1974), the court upheld state jurisdiction over child dependency matters under the 1963 statute, but it is important to note that the case was decided prior to the criminal-prohibitory/civil-regulatory dichotomy in *Bryan v. Itasca County*, 426 U.S. 373 (1976).

113. 70 Op. Att’y Gen. Wis. 237, 241, 246–48 (1981). *But see In re Commitment of Burgess*, 665 N.W.2d 124, 132 (Wis. 2003) (involuntary commitment of an individual, who is found to be a “sexually violent person” under chapter 980, is “civil” rather than “criminal” based on the purposes of the chapter to provide treatment and to protect the public). *See Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006) (declining to issue habeas corpus petition despite doubts that involuntary commitment scheme was within P.L. 280’s jurisdictional grant).

114. *Mann*, 415 F.3d at 1059.

termination of parental rights. Such an outcome is only possible because of the state's authority to regulate domestic relations matters as a party to an adjudication, which is far different from a state court being available to adjudicate private civil matters such as voluntary adoptions, contract disputes, or tort claims arising out of on-reservation conduct.

In addition, there are a number of jurisdictional matters unaffected by P.L. 280. First, P.L. 280 disclaims any grant of state authority to regulate or tax trust or restricted property, or to affect any treaty-protected rights including water, hunting, and fishing rights.¹¹⁵ The civil disclaimer also precludes state probate jurisdiction over trust property and any interest therein.¹¹⁶ Second, P.L. 280 does not affect the relative bounds of state regulatory jurisdiction under the preemption and infringement tests described by the Supreme Court in *White Mountain Apache Tribe v. Bracker*.¹¹⁷ Under these related doctrines, federal law often preempts state regulatory jurisdiction over non-members in Indian country. Moreover, state regulatory jurisdiction over tribal members is generally preempted.¹¹⁸ Third, issues of tribal authority over non-members on non-Indian fee land are analyzed under the *Montana* line of cases, which establish a presumption that there is no tribal jurisdiction absent federal delegation, or exceptional circumstances.¹¹⁹ Because P.L. 280's jurisdictional grant does not affect these issues, they are similarly not in play when a state retrocedes any or all jurisdiction it gained under P.L. 280.

Also unaffected by retrocession are crimes related to Indian gaming, which is governed by the Indian Gaming Regulatory Act of 1988 (IGRA).¹²⁰ Three provisions of the IGRA govern gaming-related criminal activity in Indian country.¹²¹ One provision makes state

115. 28 U.S.C. § 1360(b) (2006) (civil); 18 U.S.C. § 1162(b) (2006) (criminal). The full text of both disclaimers is quoted in note 88, *supra*.

116. 28 U.S.C. § 1360(b); 18 U.S.C. § 1162(b).

117. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (evaluating preemption of state jurisdiction over non-Indian conducting business with Indian tribe by balancing the relative federal, tribal, and state interests in light of traditional notions of tribal independence from states).

118. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (state taxation of Indians in Indian country generally preempted); *see* COHEN, *supra* note 2, § 6.03, at 520–37. Of course, as noted above, P.L. 280 alters these doctrines to the extent it opens the courthouse door to adjudicate civil causes of action in state courts and to apply state law to resolve such disputes.

119. *Montana v. United States*, 450 U.S. 544 (1981); *see also* *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); COHEN, *supra* note 2, § 6.02[2], at 515–20.

120. 25 U.S.C. §§ 2701–21 (2006). *See generally* COHEN, *supra* note 2, § 12, at 857–88.

121. 18 U.S.C. §§ 1166–68.

gambling laws applicable within Indian country as a matter of federal law,¹²² but “gambling” does not include class I or II gaming as defined in IGRA, or class III gaming if conducted pursuant to a tribal-state compact.¹²³ However, IGRA explicitly confers authority to prosecute any violations of state law exclusively on the federal government, unless otherwise provided by a tribal-state compact.¹²⁴ This provision has been interpreted as preempting any state criminal jurisdiction over gaming-related matters. In *Sycuan Band of Mission Indians v. Roache*,¹²⁵ the court rejected California’s argument that it retained jurisdiction to enforce state gaming laws in Indian country.¹²⁶

To summarize, in non-mandatory P.L. 280 states: (1) Indians are potentially subject to prosecution by federal authorities under the Major Crimes Act or Indian Country Crimes Act, by state authorities under the terms of a P.L. 280 assumption, and by tribal authorities under inherent tribal power; (2) non-Indians are subject to federal prosecution under the Indian Country Crimes Act, and state prosecution under the terms of a P.L. 280 assumption, or the common law rules permitting state prosecutions of non-Indian versus non-Indian crime. When considering state criminal jurisdiction under P.L. 280, one must remember to evaluate whether the particular law is simply a civil regulation dressed up with criminal penalties—and thus not enforceable under the criminal/prohibitory civil/regulatory dichotomy developed by the Supreme Court. If this were not difficult enough, the Supreme Court has permitted non-mandatory states to selectively assert jurisdiction under P.L. 280, which adds another level of complexity in those jurisdictions—such as Washington.

122. 18 U.S.C. § 1166(a) (“Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.”).

123. 18 U.S.C. § 1166(c). Definitions of gaming classes can be found at 25 U.S.C. § 2703(6)–(8) (2006). Class III gaming is commonly known as casino-style gaming and is the most lucrative and prevalent form of gaming nationally and in Washington.

124. “The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, [unless a tribal-state compact provides otherwise].” 18 U.S.C. § 1166(d) (2006). The compacting process related to the allocation of state and tribal jurisdiction is governed by 25 U.S.C. § 2710(d)(3)(C) (2006).

125. 54 F.3d 535 (9th Cir. 1994).

126. *Id.* at 539–40.

IV. WASHINGTON'S JURISDICTIONAL SCHEME UNDER P.L. 280 IS CONFUSING AND INCONSISTENT WITH THE CONSENT PARADIGM

The rules governing federal, state, and tribal jurisdiction set out in Section II changed when the Washington State Legislature passed important legislation in 1957¹²⁷ and 1963.¹²⁸ The 1957 legislation followed the consent paradigm as it offered state jurisdiction over Indian country only upon request from the affected tribe. On the other hand, in 1963, the state selectively assumed jurisdiction without regard to tribal wishes.¹²⁹ Eleven tribes requested state jurisdiction pursuant to the 1957 statute, although seven tribes achieved partial retrocession of state jurisdiction.¹³⁰

Challenges to state jurisdiction came promptly. Individuals subject to state prosecutions contested the validity of the state's assertion of jurisdiction on constitutional grounds. In *State v. Paul*,¹³¹ the defendant

127. 1957 Wash. Sess. Laws 941, ch. 240. The operative section of that statute is carried forward at WASH. REV. CODE § 37.12.021 (2010):

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he or she shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: PROVIDED, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

Id.

128. 1963 Wash. Sess. Laws 346, ch. 36 (codified at WASH. REV. CODE § 37.12.010); *see also* M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 704–12 (2012) (discussing the 1957 and 1963 statutes).

129. *See infra* notes 137–68 and accompanying text for details about the 1963 statute.

130. The eleven are: Muckleshoot, Squaxin Island, Nisqually, Skokomish, Suquamish (Port Madison), Tulalip Tribes, Quinalt Indian Nation, Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation, Swinomish Tribal Community, and Confederated Tribes of the Colville Reservation. 1 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN: THE IMPACT OF PUBLIC LAW 280 UPON THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS 78–81 (1974). The Swinomish and Colville requests for state jurisdiction were made after 1963, and thus under that statute, which carried forward most of the voluntary consent provisions of the 1957 statute. *See* Colville Business Council Res. 1965-4 (Jan. 13, 1965) (full jurisdiction, except fish and game regulation) (on file with Washington Law Review); Swinomish Indian S. Res. (Mar. 23, 1963) (criminal jurisdiction only) (on file with Washington Law Review). The 1963 version dropped the requirement for the Yakima, Colville, and Spokane tribes that any assumption be approved by a two-thirds vote at a tribal referendum. *Cf.* 1963 Wash. Sess. Laws 346, ch. 36; 1957 Wash. Sess. Laws 941, ch. 240. *See infra* note 178 for the seven tribes that achieved partial state jurisdiction.

131. 53 Wash. 2d 789, 337 P.2d 33 (1959).

challenged a prosecution under the 1957 statute on the ground that the state's enabling act and constitution disclaimed any jurisdiction over Indian lands.¹³² While Congress authorized states to amend their constitutions so that they could accept jurisdiction over Indian country under P.L. 280,¹³³ Washington failed to do so. Nevertheless, the Washington State Supreme Court upheld Washington's assertion of jurisdiction, reasoning that the state constitution need not be amended as a matter of P.L. 280 or state law.¹³⁴ In addition to the *Paul* litigation, the Quinault Indian Nation unsuccessfully challenged Washington's assertion of jurisdiction in federal court before the Ninth Circuit on the same state constitutional ground.¹³⁵ After a later Ninth Circuit ruling that Washington's partial assumption of jurisdiction scheme lacked a rational basis and thus violated the federal equal protection guarantee, the United States Supreme Court reversed, and also held that states with disclaimers in their constitutions were not required as a matter of federal law to amend them to assume P.L. 280 jurisdiction.¹³⁶

132. The state's enabling act provided:

That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States

Act of Feb. 22, 1889, 25 Stat. 676 (emphasis added). It was mirrored in the state constitution. WASH. CONST. art. 26.

133. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590 ("Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act.").

134. *Paul*, 53 Wash. 2d at 794, 337 P.2d at 37.

135. *Quinault Indian Nation v. Gallagher*, 368 F.2d 648, 657–58 (9th Cir. 1966). The *Quinault* case is interesting for the fact that a group purporting to be the tribal council requested full state jurisdiction in 1958, and the state promptly assumed jurisdiction. Almost immediately, a petition signed by sixty-eight members repudiated the original request. *Id.* at 652. The Washington State Supreme Court later upheld the assumption per the original request. *State v. Bertrand*, 61 Wash. 2d 333, 341, 378 P.2d 427, 432 (1963). Other cases challenging Washington's mode of assumption are *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P.2d 590 (1969), *Tonasket v. State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), and *Comenout v. Burdman*, 84 Wash. 2d 192, 199, 525 P.2d 217, 221 (1974). As early as 1972 there was a statewide tribal effort in Washington to obtain the retrocession of state jurisdiction under P.L. 280. See *State Indian-Rights Leaders Ask Control Over Reservations*, SEATTLE TIMES, Sept. 14, 1972, at A5 [hereinafter *Indian-Rights Leaders Ask Control*]; *Leaders of 30 State Tribes Agree on Goals for Indians*, SEATTLE TIMES, Sept. 16, 1972, at A11. For a detailed discussion of tribal objections to P.L. 280, see *Searching for an Exit*, *supra* note 92, at 247–49, 263–64.

136. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 493, 500–02 (1979), *rev'g* 552 F.2d 1332 (9th Cir. 1977). The panel decision was prompted by an earlier

The 1963 legislation unilaterally asserted civil and criminal jurisdiction over (1) all off-reservation Indian country; (2) all reservations, not including Indians on tribal or allotted lands within “an established reservation”; and (3) Indians on tribal or allotted lands within “an established reservation” in the following eight subject matter areas:¹³⁷

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways.¹³⁸

A threshold issue in each case involving state jurisdiction over an Indian is whether the alleged activity occurred on “tribal or allotted lands” within a “reservation” and thus is beyond the scope of state jurisdiction if not within one of the eight enumerated areas. For example, in *State v. Boyd*,¹³⁹ the court determined that land owned by the United States Bureau of Reclamation within the Colville Reservation was not “tribal or allotted land” so that state criminal jurisdiction was permitted.¹⁴⁰ In *State v. Pink*,¹⁴¹ the state lacked jurisdiction over a firearms offense on a state highway right-of-way because the court found that the underlying land was held in trust by the United States for the benefit of the tribe, therefore the state’s jurisdiction was limited to

en banc remand to determine the equal protection issue. 550 F.2d 443 (9th Cir. 1977) (en banc).

137. This is a paraphrase of WASH. REV. CODE § 37.12.010 (2010). The verbatim text provides: The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following [eight areas]

Id. For the enumerated eight areas, see *infra* text accompanying note 138.

138. WASH. REV. CODE § 37.12.010. As set out in *supra* note 136, the Supreme Court upheld this scheme in the face of an equal protection challenge.

139. 109 Wash. App. 244, 34 P.3d 912 (2001).

140. *Id.* at 252, 34 P.3d at 916.

141. 144 Wash. App. 945, 185 P.3d 634 (2008).

traffic offenses.¹⁴² The court ruled in *State v. Jim*¹⁴³ that a treaty fishing access site was a “reservation” precluding state criminal or civil jurisdiction over Indians, except for the eight areas.¹⁴⁴ In *State v. Comenout*,¹⁴⁵ the court upheld criminal jurisdiction over tribal members violating state law on an off-reservation allotment.¹⁴⁶

Tribes formally recognized after P.L. 280 was amended in 1968 to require tribal consent to state jurisdiction under P.L. 280 are not subject to state jurisdiction under P.L. 280.¹⁴⁷ In *State v. Squally*,¹⁴⁸ the court faced the question of whether land added to the Nisqually reservation after 1968 was subject to state jurisdiction under P.L. 280. The court emphasized the Nisqually tribe’s original, broad request for full state jurisdiction of its reservation under the 1957 statute and ruled that trust land added to the reservation after 1968 was subject to state jurisdiction.¹⁴⁹ It is significant that in one instance where Congress chose

142. *Id.* at 955, 185 P.3d at 639. The court rejected state jurisdiction because “the State has not shown that the Quinault Tribe relinquished its interest in the land.” *Id.* The state was not attempting a prosecution for a traffic offense, but for unlawful possession of a firearm—a crime that did not involve “operation of motor vehicles upon . . . [public] highways.” *Id.* at 956, 185 P.3d at 639. The court distinguished *Somday v. Rhay*, 67 Wash. 2d 180, 184, 406 P.2d 931, 934 (1965), which upheld full state jurisdiction over a highway right-of-way running across fee simple non-Indian land. The court reasoned that because the tribe had surrendered its entire interest in the surface and subsurface, the state could rely on its blanket assertion of jurisdiction over Indians on non-Indian fee lands.

143. 173 Wash. 2d 672, 273 P.3d 434 (2012).

144. *Id.* at 685, 273 P.3d at 440; *see also* *State v. Sohapp*, 110 Wash. 2d 907, 757 P.2d 509 (1988) (holding that state did not have jurisdiction over an “in-lieu” fishing site that was created under federal law to replace Indian fishing grounds developed by construction of the Bonneville Dam). These cases could both have been decided on the alternative ground that P.L. 280’s disclaimer of jurisdiction over treaty fishing rights precluded state jurisdiction. That is, assuming P.L. 280 applied in full, it does not authorize jurisdiction over Indian treaty fishing rights. 18 U.S.C. § 1162(b) (2006). Another ground for denying state jurisdiction is based on the fact that the reservation Indian country was established after 1968 when tribal consent was made a prerequisite to state assumptions of jurisdiction. *See infra* note 147 and accompanying text. Moreover, state fish and game laws are part of a civil/regulatory regime and thus beyond P.L. 280’s grant. COHEN, *supra* note 2, § 18.03[2][b], at 1126–27. Any state jurisdiction over treaty hunting, fishing, or gathering activity by Indians, whether on or off-reservation, must conform to the “conservation necessity standards” set out by the U.S. Supreme Court. *Id.*, § 18.04[3][b], at 1143–46; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 682 (1979).

145. 173 Wash. 2d 235, 267 P.3d 355 (2011).

146. *Id.* at 239, 267 P.3d at 357.

147. Pub. L. No. 90-284, §§ 402, 406, 82 Stat. 79 (1968) (codified at 25 U.S.C. §§ 1322(a), 1326 (2006)); *see* COHEN, *supra* note 2, § 6.04[3][f][ii], at 577–78.

148. 132 Wash. 2d 333, 343, 937 P.2d 1069, 1074 (1997).

149. Similarly, in *State v. Cooper*, 130 Wash. 2d 770, 928 P.2d 406 (1996), the court ruled that state jurisdiction extended to off-reservation allotments that were in existence when the non-consensual 1963 law passed. The court stated: “We assume, without deciding, that the subsequent establishment of a new Indian reservation vitiates the pre-existing RCW 37.12.010 assumption of

to make P.L. 280 applicable to lands taken in trust in a P.L. 280 state after 1968 for a restored tribe it explicitly so provided.¹⁵⁰ If the preexisting assertion of state jurisdiction under P.L. 280 extended to newly recognized tribes and Indian country, Congress's action would have been unnecessary. Moreover, the Indian law canons of construction counsel against broadly interpreting P.L. 280 to the detriment of tribal sovereignty as "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."¹⁵¹

If a prosecution under P.L. 280 arises anywhere within Indian country, the court must undertake an analysis of the criminal/prohibitory civil/regulatory dichotomy.¹⁵² As a threshold matter, recall that state civil jurisdiction under P.L. 280 is limited to "opening the courthouse door" and does not authorize the exercise of state *regulatory* jurisdiction.¹⁵³ Thus, whenever the state asserts criminal jurisdiction over an Indian, the prosecution must demonstrate that the conduct is prohibited as a matter of state law and is not actually part of a civil regulatory regime.

A significant amount of litigation has involved activity on public highways under the eighth category— operation of vehicles on public highways.¹⁵⁴ In *State v. Abrahamson*,¹⁵⁵ Division I of the Washington State Court of Appeals correctly upheld a drunk driving conviction on

state jurisdiction with respect to Indian lands *within* the boundaries of the new reservation." *Id.* at 781 n.6, 928 P.2d at 411 n.6 (emphasis in original). The court elaborated: "Four reservations were formed after 1968, and their membership never elected to come under state jurisdiction. The Jamestown-Klallam, Nooksack, Sauk Suiattle and Upper Skagit reservations are not subject to RCW 37.12.010." *Id.* (citing Pamela B. Loginsky, *Criminal Jurisdiction Issues*, in WASH. STATE BAR ASS'N, CONTINUING LEGAL EDUC. COMM. & INDIAN LAW SECTION, PERSPECTIVES ON INDIAN LAW, at 4–8 (1992)). The list should also include the Stillaguamish, Cowlitz, and Snoqualmie Tribes, who were formally acknowledged after 1968, and whose reservations were similarly established after 1968. The Cowlitz Tribe does not yet have a reservation.

150. 25 U.S.C. § 715d (authorizing state jurisdiction over Coquille Tribe in Oregon—a mandatory P.L. 280 state).

151. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976); see COHEN, *supra* note 2, § 6.04[3][f][ii], at 577–78; Leonhard, *supra* note 128, at 712–14.

152. See *supra* Part III.B. This would include the state's assertion of jurisdiction over off-reservation trust lands and allotments as well as fee lands within reservations. See COHEN, *supra* note 2, § 6.04[3][b], at 546–53 for a detailed discussion of the scope of jurisdiction granted by P.L. 280.

153. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991); see CAPTURED JUSTICE, *supra* note 38, at 17–18 (discussing Washington jurisdictional scheme).

154. See cases cited *supra* note 141 and *infra* notes 155, 157, 160, 162.

155. 157 Wash. App. 672, 238 P.3d 533 (2010).

public roads on the Tulalip Indian Reservation.¹⁵⁶ Drunk driving seems clearly to fall on the criminal/prohibitory side of the P.L. 280 dichotomy. On the other hand, in the case of an individual who did not consent to a breathalyzer or blood draw test and was accordingly subject to a civil suspension of his license, another court held that “[s]tatutes that authorize evidence collection in support of prosecuting criminal cases are properly classified as criminal in nature.”¹⁵⁷ While the court may be correct as to the authority to gather evidence from a defendant in support of a prosecution over which P.L. 280 grants jurisdiction, the court’s reasoning as to the criminality of the implied consent statute is doubtful. This is because the only sanction for refusing a blood or breathalyzer test is a civil license suspension, and the legislature explicitly provided that refusal to comply with the implied consent statute “is designated as a traffic infraction and may not be classified as a criminal offense.”¹⁵⁸ The court also inferred that the criminal/prohibitory civil/regulatory distinction mandated by the United States Supreme Court might not apply because Washington assumed jurisdiction in a more limited way than the mandatory states involved in *Cabazon* and *Bryan*.¹⁵⁹ This seems incorrect and inconsistent with *Confederated Tribes of the Colville Reservation v. Washington*,¹⁶⁰ where the tribes successfully challenged the state’s authority over traffic offenses under P.L. 280. In *Colville*, the Ninth Circuit ruled that Washington may not regulate speeding by tribal members because speeding is not a criminal offense, but rather a civil infraction sanctioned by a fine; the court drew no distinction based on whether a state is one of the six mandatory jurisdictions under P.L. 280.¹⁶¹ However, in *Yallup* it was likely proper to use the result of the

156. *Id.* at 685, 238 P.3d at 539.

157. *State v. Yallup*, 160 Wash. App. 500, 508, 248 P.3d 1095, 1099 (2011).

158. WASH. REV. CODE § 46.63.020 (2010). The legislature made a long list of exceptions to the rule, but did not include § 46.20.308(2)(a), which is the implied consent suspension statute. *See id.* At the same time, the court cited *Abrahamson*, 157 Wash. App. 672, 238 P.3d 533, which held that the state did have jurisdiction over the underlying drunk driving offense. *Id.*

159. *Yallup*, 160 Wash. App. at 506, 248 P.3d at 1098.

160. 938 F.2d 146 (9th Cir. 1991).

161. *Id.* at 147–48. It is important to remember that P.L. 280’s grant of civil jurisdiction only opened the courthouse door to private civil disputes. Thus, state courts may entertain personal injury lawsuits involving Indians arising within reservations on public highways. *McCrea v. Denison*, 76 Wash. App. 95, 885 P.2d 856 (1994). Moreover, under Washington Superior Court Rule 82.5(b), state courts may defer to tribal court jurisdiction. WASH. SUP. CT. R. 82.5(b). That rule, adopted in 1995, provides:

Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the

blood test in aid of the conviction for driving under the influence because the state has jurisdiction over Indians on public highways and the blood draw took place on fee land where the state has full P.L. 280 jurisdiction.¹⁶² The defendant was properly subject to criminal prosecution for driving under the influence, but a civil sanction for refusing a test under the implied consent statute would be of doubtful validity.

There has been much less litigation involving the other seven categories encompassed by the statute. The state asserted jurisdiction over public assistance under category (2), although no reported decisions have been located. Three of the categories—domestic relations (category 3),¹⁶³ adoption proceedings (category 6), and dependent children (category 7)—relate to family law matters and allow state courts to adjudicate matters involving family relationships.¹⁶⁴ It is more difficult to determine the jurisdiction permissible in terms of commitments for mental illness (category 4). Under the reasoning of *Doe v. Mann*, such status determinations presumably would be within state civil

appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.

Id.

162. *Yallup*, 160 Wash. App. at 503, 248 P.3d at 1097. When a state officer wishes to conduct a search in territory where the state lacks jurisdiction under P.L. 280, the proper recourse is to obtain a warrant from the tribal court. *Cf. South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004).

163. In *Estate of Cross*, 126 Wash. 2d 43, 50, 891 P.2d 26, 29 (1995), the Washington State Supreme Court responded to a certified question from the United States Tax Court ruling that “[c]ommunity property law is included under domestic relations [for purposes of P.L. 280 jurisdiction].” Interestingly, the court noted that “the United States Tax Court must make a factual inquiry as to whether any tribal custom existed and if so whether the customs contradict or supplement Washington community property law.” *Id.* at 49–50, 891 P.2d at 29. The court did not consider other objections based on federal law. *Id.* at 49, 891 P.2d at 28–29. Of course, P.L. 280 expressly denies the application of state law or state jurisdiction to distribution of trust or restricted property in probate proceedings or otherwise. 25 U.S.C. § 1322(b) (2006).

164. Prior to assumption of jurisdiction, it was clear that juvenile courts lacked jurisdiction to enter dependency and delinquency determinations involving Indian children within Indian country. *See State ex rel. Adams v. Superior Court*, 57 Wash. 2d 181, 356 P.2d 985 (1960). *Adams* was a companion case to *In re Colwash*, 57 Wash. 2d 196, 356 P.2d 994 (1960). After the 1963 assumption of jurisdiction, the court in *Comenout v. Burdman*, 84 Wash. 2d 192, 201, 525 P.2d 217, 222 (1974), upheld state jurisdiction over child dependency matters. The case was decided before the U.S. Supreme Court developed the civil/regulatory limitation on state jurisdiction in *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976). If viewed as a civil regulatory proceeding due to the coercive effect on parental rights, jurisdiction over such matters may no longer be with the state. *See supra* notes 112 and 114 and the accompanying discussion of *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). In any event, the exercise of any state jurisdiction in child custody proceedings must take place in conformity with the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (2006).

adjudicatory jurisdiction,¹⁶⁵ although the coercive effect of a civil commitment may make it fall on the civil/regulatory divide of P.L. 280 and thus beyond state jurisdiction. Adjudication of matters involving juvenile delinquency (category 5) includes criminal matters on tribal and allotted lands.¹⁶⁶ On the other hand, with regard to compulsory school attendance (category 1), one might expect state authority on trust and allotted lands within reservations to be limited, or non-existent, because regulation of school attendance seems to be a civil regulatory matter. This is especially true because there is a federal statute that expressly authorizes state jurisdiction over such on-reservation matters, but only when the tribe has consented to state jurisdiction, and the Secretary of the Interior has approved the state jurisdiction.¹⁶⁷ That the state's assumption of jurisdiction over the eight areas took place years before the civil regulatory/adjudicatory dichotomy was revealed by the Supreme Court in *Bryan v. Itasca County* and amplified in *Cabazon Band*¹⁶⁸ would explain how the legislature misconceived its authority on the civil/regulatory side.

Now, anyone has to admit that this is a very complex and confusing jurisdictional scheme. Nevertheless, state and tribal officials, courts, and the public must deal with the piecemeal fashion in which state jurisdiction has been imposed. One way to deal with it would be to simply get rid of all P.L. 280 jurisdiction—something made possible by Congress.

165. See *supra* notes 112 and 114 and accompanying text for a discussion of *Doe v. Mann*, 415 F.3d 1038.

166. Juvenile courts have exclusive jurisdiction under Washington law over matters “[r]elating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations as provided in RCW 13.40.020 through 13.40.230[.]” WASH. REV. CODE § 13.04.030(1)(e) (2010). To the extent that a juvenile has committed a traffic or civil infraction, state court jurisdiction would not exist because the state’s authority is limited to criminal jurisdiction and does not include civil regulatory authority. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991).

167. 25 U.S.C. § 231 (2006). The implementing regulations at 25 C.F.R. § 273.52 (2012) refer to P.L. 280 as if it conferred similar authority, but the regulation was adopted in 1975 and thus predates the decision in *Bryan v. Itasca Cnty.*, 426 U.S. 373, which made it clear that civil regulatory jurisdiction was not granted by P.L. 280. See COHEN, *supra* note 2, § 6.04[5][a], at 586; cf. *Colwash*, 57 Wash. 2d at 198–99, 356 P.2d at 996 (holding that state jurisdiction over truancy matters under 25 U.S.C. § 231 would not extend to dependency proceeding).

168. See CAPTURED JUSTICE, *supra* note 38, at 17–18 (discussing Washington’s jurisdictional scheme).

V. CONGRESS AMENDED P.L. 280 SO STATES MAY
RETROCEDE JURISDICTION, BUT TRIBES HAVE NO
FORMAL ROLE IN THE PROCESS

When P.L. 280 was passed, tribal dissatisfaction with the unilateral assertion of state jurisdiction was widespread and well documented.¹⁶⁹ Adopted in the midst of the now-repudiated termination era, the statute and the state jurisdiction that accompanied it—most often without tribal consent—are illustrative of discredited policies inconsistent with the modern Indian self-determination policies. Washington tribes reacted to this by initiating concerted efforts in 1972 to remove state jurisdiction from their Indian country.¹⁷⁰ When a local congressman claimed before a congressional committee that jurisdictional confusion had been solved in Washington under P.L. 280, the Vice-President of the National Congress of American Indians, Mel Tonasket, retorted, “[Congressman] Meeds made some statements that are totally false . . . He should know better.”¹⁷¹

Like Washington tribes, national Indian organizations were consistent in their opposition to the unilateral imposition of P.L. 280 jurisdiction on tribes.¹⁷² In one of many cases challenging the state’s assertion of P.L. 280 jurisdiction, the Ninth Circuit observed that, “Indian tribes were critical of Pub. L. 280 because section 7 authorized the application of state law to tribes without their consent and regardless of their needs or circumstances.”¹⁷³ In 1968, Congress repealed the section of P.L. 280 that allowed states to acquire jurisdiction without tribal consent. It also amended the statute by providing that “[t]he United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to [P.L. 280].”¹⁷⁴ The President of the United States authorized the Secretary of the Interior to accept a state’s retrocession after consulting with the Attorney General.¹⁷⁵ However, the Secretary is not required to

169. See Leonhard, *supra* note 128, at 698–701.

170. See *Indian-Rights Leaders Ask Control*, *supra* note 135.

171. David Suffia, *Indian Leader Says Meeds Lied About Effects of Policing*, SEATTLE TIMES, May 31, 1978, at G7. Mr. Tonasket was also the Chairman of the Confederated Tribes of the Colville Reservation. *Id.*

172. 1 AM. INDIAN POLICY REVIEW COMM’N, FINAL REPORT TO CONGRESS, 205–06 (1977) (discussing events leading to a draft retrocession bill introduced in 1975 by Senator Henry Jackson).

173. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979).

174. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (2006)).

175. Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968).

accept the retrocession. As a practical matter, the Secretary considers the law enforcement capacity of the tribe and the United States with respect to any retrocession in order to avoid a decrease in on-the-ground law enforcement. Also, the views of the Justice Department carry great weight because the local U.S. Attorney and FBI would have increased obligations to enforce federal criminal laws in Indian country after any retrocession. Since 1968, there have been thirty-one tribes that have fully or partially achieved state retrocession over some or all of the Indian country under their jurisdiction.¹⁷⁶ Prior to 2012, Washington's retrocession laws provided that certain tribes that agreed to full state criminal and civil jurisdiction under the 1957 state law could request retrocession of some (but not all) state criminal jurisdiction.¹⁷⁷ There was no provision for retrocession of civil jurisdiction. Of the eleven tribes that requested full state jurisdiction under the 1957 state law, seven requested and were granted retrocession.¹⁷⁸

176. *Searching for an Exit*, *supra* note 92, at 265–66; CAPTURED JUSTICE, *supra* note 38, at 166. There are 170 tribes in the lower forty-eight states that are subject to state authority under P.L. 280. CAROLE GOLDBERG & DUANE CHAMPAGNE, NATIVE NATION LAW & POLICY CTR., FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 9–11 (2007) [hereinafter FINAL REPORT], available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>. The Federal Register announcements accepting retrocession are as follows:

(1) full civil and criminal jurisdiction: fifteen Nevada tribes, 40 Fed. Reg. 27,501 (June 30, 1975); Ely Indian Colony, 53 Fed. Reg. 5837 (Feb. 26, 1988); Menominee, 41 Fed. Reg. 8516 (Feb. 27, 1976); Burns Paiute, 44 Fed. Reg. 26,169 (May 4, 1979); Omaha, 35 Fed. Reg. 16,598 (Oct. 16, 1970); Santee Sioux, 71 Fed. Reg. 7994 (Feb. 15, 2006);

(2) criminal retrocession only: Umatilla, 46 Fed. Reg. 2195 (Jan. 8, 1981), Winnebago, 51 Fed. Reg. 24,234 (July 2, 1986); Bois Forte Band of Chippewa, 40 Fed. Reg. 4026 (Jan. 27, 1975); and

(3) partial criminal retrocession: Confederated Salish and Kootenai Tribes, 60 Fed. Reg. 33,318 (June 27, 1995); seven Washington tribes listed in *infra* note 178.

177. The current statute, WASH. REV. CODE § 37.12.120 (2010), provides:

Whenever the governor receives from the confederated tribes of the Colville reservation or the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, or Tulalip tribe a resolution expressing their desire for the retrocession by the state of all or any measure of the criminal jurisdiction acquired by the state pursuant to RCW 37.12.021 over lands of that tribe's reservation, the governor may, within ninety days, issue a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over such reservation. However, the state of Washington shall retain jurisdiction as provided in RCW 37.12.010. The proclamation of retrocession shall not become effective until it is accepted by an officer of the United States government in accordance with 25 U.S.C. Sec. 1323 (82 Stat. 78, 79) and in accordance with procedures established by the United States for acceptance of such retrocession of jurisdiction. The Colville tribes and the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, and Tulalip tribes shall not exercise criminal or civil jurisdiction over non-Indians.

Id.

178. The Muckleshoot, Squaxin Island, Skokomish, and Nisqually Indian tribes remain subject to full state jurisdiction. The seven tribes who achieved limited retrocession are: Tulalip Tribes, 65 Fed. Reg. 75,948 (Dec. 5, 2000) and 65 Fed. Reg. 77,905 (Dec. 13, 2000); Confederated Tribes of

In the 2011 Washington State legislative session, Representative John McCoy introduced a bill that permitted the full or partial retrocession of state criminal jurisdiction to the United States upon an Indian tribe's request.¹⁷⁹ The bill required the Governor to issue a proclamation retroceding state criminal jurisdiction if requested by the Indian tribe¹⁸⁰ and acknowledged that retrocession would only become effective if accepted by a duly designated officer of the United States government."¹⁸¹ The Secretary of the Interior is the officer designated to accept a retrocession.¹⁸² A subsequent amendment—offered by Representative McCoy—would have eliminated the Governor's obligation to issue a retrocession proclamation upon receipt of a request from a tribe and instead provide her with discretion to approve a retrocession petition and forward a proclamation to the Secretary of the Interior.¹⁸³ While the bill did not become law, there was tremendous interest in the proposal from tribes, the U.S. Attorney's office, and state law enforcement entities. The premise of the proposed legislation was that Indian tribes should have the choice whether to be subject to state jurisdiction, and that it was unfair for Congress to allow state jurisdiction without tribal consent.

The Governor, Speaker of the House, and President of the Senate appointed a Joint Executive-Legislative Workgroup to consider retrocession issues before the 2012 legislative session.¹⁸⁴ A letter signed by Governor Gregoire, House Speaker Frank Chopp, and Senate President Lisa Brown explained:

It became apparent that retrocession is an issue of broad importance to the tribes; federal, state and local governments; and the citizenry of Washington. It also became apparent that retrocession is not generally understood and that a coordinated and focused effort would be necessary to give the issue the

the Chehalis Reservation, Quileute Indian Reservation, and Swinomish Tribal Community, 54 Fed. Reg. 19,959 (May 9, 1989); Confederated Tribes of the Colville Reservation, 52 Fed. Reg. 8372 (Mar. 17, 1987); Suquamish (Port Madison), 37 Fed. Reg. 7353 (Apr. 13, 1972); Quinault Indian Nation, 34 Fed. Reg. 14,288 (Aug. 30, 1969).

179. H.B. 1773, 62d Leg., Reg. Sess. (Wash. 2011).

180. *Id.* § 3.

181. *Id.* § 4.

182. See Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968).

183. H.B. 1773, H. Amd. 343, 62d Leg., Reg. Sess. (Wash. 2011).

184. See FINAL B. REP., E.S.H.B. 2233, 62d Leg., Reg. Sess., at 3 (Wash. 2012). For information about the task force see <http://www.leg.wa.gov/jointcommittees/JELWGTR/Pages/default.aspx>. The Task Force included the author of this Article and Professor Douglas Nash of Seattle University School of Law as academic advisors.

attention it deserves and allow all affected parties an opportunity to discuss and understand potential implications.

Accordingly, we have agreed to establish a Joint Executive-Legislative Workgroup on Tribal Retrocession.¹⁸⁵

The twenty-member task force met four times between July and November for in-depth discussions of the issues and development of a draft bill. A wide variety of constituencies provided information and advice to the task force, which discussed a draft bill at its final meeting in November 2011.¹⁸⁶ As a result, members of the State House and Senate introduced identical bills at the start of the 2012 Session—House Bill 2233¹⁸⁷ and Senate Bill 6147.¹⁸⁸ The 2012 version of the bill included two major changes. First, it afforded the Governor discretion to reject a tribal petition for retrocession, and second, allowed for retrocession of civil as well as criminal jurisdiction. The new legislation was approved in the Senate on March 5, 2012 by a vote of 42-6, and in the House by a vote of 59-38 on March 6, 2012.¹⁸⁹ It became effective on June 7, 2012, ninety days after the Governor signed the bill, as provided by state law.¹⁹⁰

Washington's 2012 retrocession legislation authorizes the Governor to forward a proclamation for retrocession to the Secretary of the Interior when certain conditions are met. While previous law permitted only the partial retrocession of criminal jurisdiction and no retrocession of civil jurisdiction (and now applies to only two of the four tribes that remain subject to full state jurisdiction), the new legislation allows for retrocession of "all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe."¹⁹¹ The process is commenced by a tribal resolution and would be carried out in the following fashion:

(1) The governing body of a tribe submits a resolution to the

185. Letter from Christine O. Gregoire, Frank Chopp & Lisa Brown to Eric Johnson, Exec. Dir., Wash. State Ass'n of Cnty., (May 26, 2011) (on file with Washington Law Review).

186. *Joint Executive-Legislative Workgroup on Tribal Retrocession*, WASH. STATE LEGISLATURE, <http://www.leg.wa.gov/JointCommittees/JELWGTR/Documents/2011-11-16/Agenda.pdf> (Nov. 16, 2011). The agendas for all four meetings reveal the wide array of witnesses who assisted the Task Force. WASH. STATE LEGISLATURE, *supra*, at <http://www.leg.wa.gov/jointcommittees/JELWGTR/Pages/default.aspx> (last visited Nov. 4, 2012).

187. H.B. 2233, 62d Leg., Reg. Sess. (Wash. 2012).

188. S.B. 6417, 62d Leg., Reg. Sess. (Wash. 2012).

189. FINAL B. REP., E.S.H.B. 2233, 62d Leg., Reg. Sess., at 5 (Wash. 2012).

190. E.S.H.B. 2233, 62d Leg., Reg. Sess., at 5 (Wash. 2012) (codified at WASH. REV. CODE §§ 37.12.160–.180 (2012)).

191. WASH. REV. CODE § 37.12.160(1).

Governor requesting retrocession with information regarding the tribe's plan to exercise jurisdiction after retrocession.¹⁹²

(2) Within ninety days of receiving the resolution, the Governor must convene a government-to-government meeting with the tribal governing body or its designated representatives. The Governor's office must also consult with elected officials of state political subdivisions located near the Indian tribe's territory.¹⁹³

(3) The Governor has one year after receiving the tribal resolution to approve or deny the request in whole or in part, although extensions may be made for any term by agreement, or unilaterally by either party for six months. Any denial of a tribal request must be supported by reasons set out in writing by the Governor. If accepted, a proclamation to that effect must be issued and forwarded on to the Secretary of the Interior within ten days.¹⁹⁴

(4) Within 120 days of receiving the tribal resolution, but before approving it, designated standing committees of each house in the legislature must be notified, and they may have hearings and make non-binding recommendations to the Governor.¹⁹⁵

(5) The proclamation for retrocession will not be effective until accepted by a "duly designated officer of the United States government."¹⁹⁶

192. *Id.* § 37.12.160(2) ("The resolution must express the desire of the tribe for the retrocession by the state of all or any measures or provisions of the civil and/or criminal jurisdiction acquired by the state under this chapter over the Indian country and the members of such Indian tribe. Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.").

193. *Id.* § 37.12.160(3).

194. *Id.* § 37.12.160(4).

195. *Id.* § 37.12.160(5).

196. *Id.* § 37.12.160(6). This section also refers to "procedures established by the United States for the approval of a proposed state retrocession." *Id.* There are no formal procedures aside from the delegation of authority from the President to the Secretary of the Interior, who must consult with the United States Attorney General before accepting a retrocession and publishing the determination in the Federal Register. Here is the Executive Order:

By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U.S.C. 9) [§ 9 of this title] and as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or of any other officer of the United States, any and all authority conferred upon the United States by section 403(a) of the Act of April 11, 1968, 82 Stat. 79 (25 U.S.C. 1323(a)) [subsection (a) of this section]: *Provided*, That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the FEDERAL REGISTER of a notice which shall specify the jurisdiction

(6) If the proclamation addresses jurisdiction over public roads, the Governor must consider: (a) whether tribal interlocal agreements exist with other jurisdictions that address uniformity of motor vehicle operations in Indian country; (b) whether there is a tribal police department to ensure safety; (c) whether the tribe has traffic codes and courts; and (d) whether there are appropriate traffic control devices in place.¹⁹⁷

(7) The legislation contains savings clauses that reserve any state jurisdiction over civil commitment of sexually violent predators under state law,¹⁹⁸ and ensures that cases commenced in state courts or agencies prior to the effective date of a retrocession may continue.¹⁹⁹ It also provides that the tribes covered by the existing partial retrocession scheme would remain eligible to use that mechanism.²⁰⁰

The Joint Executive-Legislative Work Group on Tribal Retrocession worked hard to understand the complex legal and policy issues implicated in Indian country. The task force's leadership received input from state, federal, and tribal law experts to understand how tribal desires for retrocession of state civil and criminal jurisdiction could best be accomplished, and the effects of retrocession on both Indian and non-Indian parties. Those concerns were taken into account in a fashion that provides for non-tribal input to a process that tribes may initiate and present directly to the Governor.²⁰¹ In the end, however, the Governor

retroceded and the effective date of the retrocession: *Provided further*, That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.

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Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968); 25 U.S.C.A. § 1323 Note.

197. WASH. REV. CODE § 37.12.160(8). This section was the last amendment to the bill. An earlier Senate amendment would have required the Governor (and in some cases other state agencies) to certify that actions and agreements on the foregoing matters (including inter-local agreements) were actually in place. E.S.H.B. 2233, S. Amd. 153, 62d Leg., Reg. Sess. (Wash. 2012). The House refused to concur in the Senate version and a Senate substitute bill was passed to provide that the Governor should simply consider the issues in making her decision on a retrocession proclamation. E.S.H.B. 2233, S. Amd. 282, 62d Leg., Reg. Sess. (Wash. 2012). This version passed the Senate on March 5, 2012 and the House concurred on March 6, 2012. H.B. REP. E.S.H.B. 2233, 62d Leg., Reg. Sess., at 1 (Wash. 2012).

198. WASH. REV. CODE § 37.12.170(1).

199. *Id.* § 37.12.170(2).

200. *Id.* § 37.12.180. The preexisting partial retrocession is available for the two tribes that have not utilized the partial retrocession process—Skokomish and Muckleshoot. *Id.* § 37.12.100. Curiously, that statute does not extend to the other two tribes that requested full P.L. 280 jurisdiction under the 1957 statute: Squaxin Island and Nisqually. *Id.*

201. *Id.* § 37.12.160(2) (“Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal

has discretion to accept to a tribal petition.

VI. THE MODERN SELF-DETERMINATION POLICY IS INCOMPLETE WITHOUT TRIBAL AUTHORITY TO INITIATE RETROCESSION AT THE FEDERAL LEVEL

A. *Washington's 2012 Retrocession Legislation Is an Excellent Model for Negotiating Jurisdiction in Indian Country*

It should be apparent by now that criminal jurisdiction in Indian country is unduly complex, and does not work very well. The regime is governed by federal law, and was imposed generally without tribal consent in a piecemeal fashion. Congress found in 2010 that:

The complicated jurisdictional scheme that exists in Indian country—

- (A) has a significant negative impact on the ability to provide public safety to Indian communities;
- (B) has been increasingly exploited by criminals; and
- (C) requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials[.]²⁰²

In any given case, federal, tribal, and state police and prosecutors determine jurisdiction in Indian country based on whether an Indian is involved in a crime as defendant or victim,²⁰³ and the nature of the offense. Indians may be federally prosecuted if they have committed an offense included in the Major Crimes Act.²⁰⁴ Indians and non-Indians alike are subject to prosecution under the Indian Country Crimes Act, but subject to exceptions in the case of Indian-on-Indian crimes, in cases of prosecutions of Indians already punished by a tribe, or in the case of a specific treaty exception.²⁰⁵ Non-Indian versus non-Indian crime is left to the states,²⁰⁶ unless it is also a violation of a general federal criminal

agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.”); *id.* § 37.12.160(8) (recommending state and local input regarding “the operation of motor vehicles upon the public streets, alleys, roads, and highways” after retrocession).

202. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4), 124 Stat. 2262.

203. *See supra* Part II.A. For a discussion of the factors bearing on whether an individual is an Indian for federal jurisdictional purposes, see *United States v. Bruce*, 394 F.3d 1215, 1223–27 (9th Cir. 2005) and Bethany R. Berger, “*Power Over this Unfortunate Race*”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV 1957 (2004).

204. 18 U.S.C. § 1153 (2006); *see supra* Part II.A.

205. 18 U.S.C. § 1152.

206. *United States v. McBratney*, 104 U.S. 621 (1881).

statute.²⁰⁷ P.L. 280 added to the complexity by transferring federal criminal *and civil* jurisdiction to six “mandatory” states, and authorizing other states to assume criminal and civil jurisdiction at their option.²⁰⁸ The only empirical study of the transfer of jurisdiction to the states under P.L. 280 demonstrates that it did not improve law enforcement in Indian country, and in most cases, law enforcement services and tribal-state relations declined.²⁰⁹ As explained above in Part IV, Washington State assumed jurisdiction in a manner that passed rational basis review, but is otherwise bewildering. Moreover, the jurisdictional arrangements described above were not developed consistently with basic democratic consent principles.²¹⁰ Rather, they were imposed upon Indian tribes by federal and state law in sporadic bursts. In recognition of this situation, the Washington State Legislature took a significant step to reduce the complexity of this arrangement by offering to surrender some of its jurisdiction in accord with tribal desires.

Washington now has an excellent system to achieve retrocession at the state and tribal level.²¹¹ The new law has deadlines and provides an opportunity for all interested parties to have their interests heard in what are essentially negotiations between petitioning tribes and the Governor’s office. Professors Goldberg and Champagne have thoroughly documented the difficulties tribes have encountered achieving retrocession in other states when the only avenue runs directly through the state legislature.²¹² When the group retrocession for fifteen tribes in Nevada is excluded, there have only been sixteen discreet campaigns for full or partial retrocessions of state jurisdiction.²¹³ In Nebraska, for example, the state legislature voted to retrocede most of its jurisdiction on the Omaha reservation in 1969. However, almost immediately after the Secretary of the Interior in 1970 accepted the retrocession, Nebraska sought to revoke its retrocession.²¹⁴ The

207. *See United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994) (holding that the federal conspiracy statute, 18 U.S.C. § 371, “is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country”).

208. *See supra* Part III.

209. *See* FINAL REPORT, *supra* note 176.

210. *See supra* note 1 and accompanying text.

211. The approach originally advanced would be better as it would put the Washington tribes in control of whether and how much jurisdiction should be retroceded by the state, albeit subject to the discretion of the Secretary of the Interior to accept or reject the proffered retrocession.

212. *Searching for an Exit*, *supra* note 92, at 264–68; CAPTURED JUSTICE, *supra* note 38, at 168.

213. *Searching for an Exit*, *supra* note 92, at 266.

214. CAPTURED JUSTICE, *supra* note 36, at 169–70.

Winnebago Tribe slowly built up its governmental infrastructure and petitioned the Nebraska legislature in 1974 for retrocession of both civil and criminal jurisdiction.²¹⁵ An expensive and bruising political battle ensued with state jurisdiction under P.L. 280 remaining intact. Ultimately, Nebraska's unicameral legislature voted to retrocede only criminal jurisdiction on the Winnebago Reservation in 1985.²¹⁶ A political compromise had to be made by dropping the retrocession request as to civil jurisdiction, with much of the opposition based on the mistaken assumption that by retroceding civil jurisdiction, the tribe would be receiving more authority.²¹⁷

By contrast, Washington's new approach provides a rational path for considering retrocession and its effect on all the affected parties. The legislature is not the place to work out the details of how retrocession will work for a particular tribe, the state, and the federal government. The legislature made the major policy decision to permit full or partial retrocession to occur at the request of the tribe. It requires the Governor to act on a tribal request under a one-year deadline so that inaction alone cannot frustrate tribal wishes.²¹⁸ Moreover, "[i]n the event the governor denies all or part of the [tribal] resolution, the reasons for such denial must be provided to the tribe in writing."²¹⁹ If the Governor issues the requested proclamation, the crucial final step is convincing the Secretary

215. *Id.* at 171.

216. *Id.* at 172–74; see Gabriela Stern, *Senators Give Winnebagos Jurisdiction*, OMAHA WORLD-HERALD, Jan. 17, 1986 (recounting rancor and racism in the legislative effort to retrocede jurisdiction). The headline from the Omaha World-Herald is premised on the common misconception that retrocession of state jurisdiction bestows additional governmental powers on affected tribes. It does not. Rather, it simply removes concurrent state jurisdiction.

217. *Control of Civil Matters Called Next Logical Step*, OMAHA WORLD-HERALD, July 21, 1985. The article quotes one opponent:

'With civil retrocession, they would have the rule of the land,' Freese said. 'For example, they could put a \$500,000 tax on a tavern business, and you either pay it or you go out of business. They could tax white-owned real estate. It could completely ruin the value of real estate.'

Id. The statement is absolutely incorrect as a matter of law. Tribal authority to tax non-members and their property is governed by a federal common law test unaffected by the application of P.L. 280. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (striking down Navajo Nation's tax on non-Indian fee simple property).

218. WASH. REV. CODE § 37.12.160(4) (2012). There is no guarantee that a Governor will grant a given retrocession petition, but one should expect good faith efforts to reach an accord.

219. *Id.* We will soon be able to see how this process plays out as the Confederated Tribes and Bands of the Yakama Reservation submitted retrocession resolutions to the Governor of Washington in July 2012. Letter from Confederated Tribes and Bands of the Yakama Nation to Governor Christine Gregoire (July 16, 2012) (attaching Yakama Tribal Council Resolutions T-117-12 and T-036-12) (on file with Washington Law Review).

of the Interior to accept the retrocession of state jurisdiction.²²⁰

One observer of the Washington process argues that while it represents a good effort, “by placing the ultimate decision in the hands of the Governor and mandating the inclusion of non-Indian governments in the decision-making process, it does not truly place the power of consent [to state jurisdiction] back in the hands of tribes.”²²¹ While it would be best for the legislature to place greater control in hands of the tribes, such an outcome is unlikely in the foreseeable future for several reasons. First, proposed legislation taking such an approach was introduced in 2011, but the sponsor soon amended it to give the Governor discretion whether to accept the proposed retrocession and the bill still failed to move out of committee.²²² Second, state and local governing bodies surrendering jurisdiction will always insist on inserting their views into the substance and manner in which their jurisdiction will be affected.²²³ The ensuing dialogue may further understanding of tribal justice systems, and lead to cooperative arrangements under state, federal, and tribal laws that allow for mutual aid agreements and cross-deputization of law enforcement officers.²²⁴ Yet, while the new legislation provides an opportunity for local government views to be considered, the legislature wisely rejected amendments that would have required the Governor to certify that certain intergovernmental agreements were actually in place.²²⁵ This is good because it allows

220. It would be useful if the Department of the Interior developed at least some guidelines for determining whether to accept a petition for retrocession. As it stands now, it is entirely an ad hoc process. See *infra* notes 254–58 and accompanying text for a reasonable approach under the Indian Child Welfare Act.

221. Leonhard, *supra* note 128, at 721. Nevada is the only state to offer unconditional retrocession to any tribe that had not consented to state jurisdiction. NEV. REV. STAT. § 41.430 (2011); see CAPTURED JUSTICE, *supra* note 38, at 184–87 (discussing Nevada’s retrocession scheme in general and problems encountered by the Ely Colony); Acceptance of Offer to Retrocede Jurisdiction, 40 Fed. Reg. 27,501 (June 24, 1975).

222. H.B. 1773, H. Amd. 343, 62d. Leg., Reg. Sess. (Wash. 2011).

223. There was little (if any) overt opposition to the retrocession as the Task Force worked through the various issues. More typical were concerns expressed by the Washington State Association of Counties and the Kitsap County Prosecuting Attorney’s Office. Both were interested in ensuring efficient and coordinated service and law enforcement delivery after any retrocession. Memorandum from Russell D. Hauge, Kitsap Prosecuting Attorney, to Sarah Lambert, Legislative Assistant, Tribal Retrocession Work Group (Nov. 2, 2011) (on file with Washington Law Review); Letter from Wash. State Ass’n of Cntys. to Representative McCoy and Retrocession Work Group (Oct. 10, 2011) (on file with Washington Law Review).

224. See Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 592 (2012) (discussing the virtues of intergovernmental cooperation).

225. Compare E.S.H.B. 2233, S. Amd. 2233-S.E AMS ENGR S4848.E § 1(8) (passed Senate on Feb. 28, 2012), with E.S.H.B. 2233, S. Amd. 282, 2233-S.E AMS PRID S5296.1 § 1(8) (passed

Indian tribes to submit their retrocession petition when they feel they have adequately consulted with state and local officials and can make their case directly to the Governor.²²⁶ The consultation mandate and the possibility for legislative hearings provide opportunities to explore all issues of concern, but ultimately leave the negotiation process to the Executive Branch of state government and the petitioning Indian tribe. It also avoids giving local governments a veto. Rather, the consultation provisions help the tribal, state, and local officials think through the manner in which the shift in jurisdiction will be implemented, and the practical consequences of the changes.

In fact, the negotiation process can facilitate better relations simply due to the increased mutual understanding that develops through the process. Indeed, several commentators have noted the benefits of tribal-state negotiations in a variety of contexts. The late David H. Getches noted that “negotiated arrangements among governments concerning jurisdiction and the provision of government services on Indian reservations can give certainty and avoid the necessity of litigation.”²²⁷ As stated by Professor Frank Pommersheim: “Without talk and conversation, there is no *hope for the future* of tribal-state relations. Yet hope must also encourage the energetic dialogue that animates and gives hope meaning in the first instance.”²²⁸ The goal is “to identify those common interests that are better served by cooperation and coordination

Senate on Mar. 5, 2012). The engrossed Senate Bill of Feb. 28, 2012 contained the mandatory certification language, which was rejected by the House and followed by the “striker” language of March 5, 2012. A complete history of the bill’s amendments can be found at <http://dlr.leg.wa.gov/bills/summary/default.aspx?bill=2233&year=2011>.

226. If state agencies and local entities were left completely out of the process, they could be expected to weigh in with their opposition at the stage when the Secretary of the Interior deliberates whether to accept the retrocession petition. Cf. Letter from Russell D. Hauge, Kitsap Prosecuting Attorney, to Governor Christine Gregoire (Sept. 14, 2012) (on file with Washington Law Review) (suggesting that the U.S. Attorney would not have adequate resources to prosecute non-Indians if state authority over non-Indian versus Indian crimes were no longer subject to state authority).

227. David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 143 (1993). Dean Getches also canvassed other federal efforts to encourage tribal-state compacting over jurisdictional matters. *Id.* at 145–47; see also COHEN, *supra* note 2, § 6.05, at 589.

228. Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L. REV. 239, 276 (1991); see also Robert T. Anderson, *Indian Water Rights, Practical Reasoning and Negotiated Settlements*, 98 CAL. L. REV. 1133, 1134 (2010) (discussing how uncertainty in the water rights area “has created an environment in which creative, practical solutions to conflicts have emerged in the Indian water settlements approved by Congress”); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 373 (1994) (“Tribal-state negotiations can be comprehensive, instead of piecemeal, as is inherent in case-by-case litigation.”).

than competition and confrontation.”²²⁹

At the same time, a state process is not enough. For example, it remains to be seen whether the Governor will accept a proffered tribal request for retrocession. Governors should be expected to operate in good faith, but tribes are in the position of supplicants seeking restoration of a jurisdictional scheme that was altered without tribal consent. Congressional action is therefore necessary and desirable to reverse the effects of the unilateral grant of state authority under P.L. 280.

B. Federal Law Should Be Changed to Provide a Tribally-Controlled Process for Negotiating the Balance of Jurisdiction in Indian Country

As noted at the outset of this Article, the consent of the governed has a hallowed place in the United States’ system of government as well as in emerging international law pertaining to indigenous peoples’ rights.²³⁰ The U.N. Declaration on the Rights of Indigenous Peoples provides that “States shall consult and cooperate in good faith with the indigenous peoples . . . in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”²³¹ As the brief historic survey of federal-state-tribal relations set out in this Article reveals, the United Nations’ consent paradigm has rarely been followed in federal Indian policy. One hundred and fifty years of vacillating policies has left a legacy of many moral and legal wrongs that must be undone. While it is not practically possible to undo all of the harmful policies manifested in federal Indian law in one fell swoop, the modern era has seen some encouraging steps that can serve as a platform for constructing further improvements.

President Nixon repudiated the termination policy and ushered in an era supportive of the federal-tribal relationship, announcing a new policy of “self-determination without termination.”²³² Congress followed suit with the Indian Self-Determination and Education Assistance Act of 1975,²³³ which allows for the transfer of the administration of federal

229. Hanna, Deloria & Trimble, *supra* note 223. This Article provides a comprehensive history of the efforts in the modern era to reach cooperative agreements in a wide variety of areas of concern to tribes and local non-Indian governments.

230. *See supra* note 1 and accompanying text.

231. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

232. H.R. Doc. No. 91-363, at 2 (1970).

233. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in 25 U.S.C. §§ 450–450n,

programs from the Bureau of Indian Affairs to the tribes.²³⁴ That program was augmented by the Self-Governance Acts of 1988,²³⁵ 1994,²³⁶ and 2000,²³⁷ which establish flexible block grant systems for tribal delivery of services the federal government would otherwise provide.²³⁸ In a host of other statutes and administrative actions, the United States today encourages and supports tribal governmental institutions.²³⁹ These modern policies hearken back to the original tribal-federal relationship that provided ample room for the exercise of tribal sovereignty within tribal territories.

While the earliest treaties reflected a desire for mutual peace and intergovernmental respect, later treaties and agreements were geared to the United States' acquisition of land.²⁴⁰ In return, the United States provided compensation in various forms. Most important from the Indian perspective were the promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples.²⁴¹ Federal intervention in internal tribal matters has a suspect doctrinal pedigree, and the Supreme Court has acknowledged as much in cases decided more than a century apart.²⁴² In fact, Indian treaties and treaty substitutes should be accorded quasi-constitutional status as they stand as the only consent-based, and thus legitimate, source of federal authority over Indian nations.²⁴³ The fact that the Supreme Court has

§§ 455–458e (2006)).

234. COHEN, *supra* note 2, § 22.02, at 1346–49.

235. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988).

236. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250.

237. Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (2000).

238. 25 U.S.C. §§ 458aa–458aaa-18.

239. *See, e.g.*, Native American Business Development, Trade Promotion, and Tourism Act of 2000, P.L. 106-464, 114 Stat. 2012 (codified at 25 U.S.C. § 4301(6)) (“[T]he United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes.”); Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (affirming the federal trust responsibility to Indian tribes). An exhaustive discussion of federal programs supporting tribal self-government and economic development can be found in COHEN, *supra* note 2, § 22, at 1335–1413.

240. *See* COHEN, *supra* note 2, § 102[1], at 16–17.

241. *Id.* § 1.03[6][a], at 64–65.

242. *Compare* United States v. Kagama, 118 U.S. 375 (1886) (rejecting the Constitution’s Indian Commerce Clause as a basis for federal jurisdiction over criminal jurisdiction in Indian country), *with* United States v. Lara, 541 U.S. 193, 201 (2004) (“Congress’ legislative authority would rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as ‘necessary concomitants of nationality.’”).

243. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and*

upheld harsh treatment of tribal legal rights at times²⁴⁴ does not mean that more enlightened treatment should not be forthcoming as a matter of policy.

The self-determination policy, backstopped by the federal government's trust responsibility to Indian nations,²⁴⁵ is the way that the United States' promise of permanent tribal homelands under federal protection is manifested in the twenty-first century. The return to tribal control over criminal and civil jurisdiction in Indian country is an essential component of this move to self-determination. States' rights are greatly valued in our federal system in order to facilitate legislative experimentation and local control. Indian tribes are the third sovereign mentioned in the Constitution. The same values favoring local control by states apply with even greater force since the tribes did not have a hand in the formation of the Constitution, and thus did not voluntarily submit themselves to the jurisdiction of the national government. In the course of setting aside Georgia's claim of authority over the Cherokee Nation, Chief Justice Marshall noted that the "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."²⁴⁶ Despite two centuries of inconsistent federal policies and actions, Chief Justice Marshall's recognition of Indian autonomy and self-government is once again at the foundation of federal policy. It has not, however, been manifested in the context of criminal jurisdiction in Indian country.

Professor Kevin Washburn of the University of New Mexico School of Law underlined these issues when he described the federal criminal jurisdictional patchwork in Indian country as a relic of repudiated policies—an anomaly in the self-determination era. "The federal Indian country criminal justice regime reflects the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their

Interpretation in Federal Indian Law, 107 HARV. L. REV. 381 406–17 (1993). As set out in the text accompanying *supra* note 1, the consent principle is foundational to federal, state, and international law.

244. *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding unilateral abrogation of Indian treaty despite promise that it would not be changed without the consent of three-fourths of adult male Indians).

245. In *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), the Supreme Court concluded that the United States "has charged itself with moral obligations of the highest responsibility and trust." *Id.*

246. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

will.”²⁴⁷ Professor Washburn concluded his analysis by suggesting that Congress should consider an opt-out program for tribes for the removal of federal jurisdiction to be replaced by sole tribal authority.²⁴⁸ While Professor Washburn’s argument has merit, an even stronger case can be made for congressional approval of legislation to authorize tribes to remove *state* jurisdiction granted under P.L. 280. This is not a new idea. In 1975, a bill was introduced that would have authorized tribes to directly petition the Secretary of the Interior for the retrocession of state jurisdiction acquired under P.L. 280.²⁴⁹ The states would have had no role in the Secretary’s decision to accept a tribal retrocession request, and the Secretary could only reject the petition if “(1) the tribe has no applicable existing or proposed law and order code, or (2) the tribe has no plan for fulfilling its responsibilities under the jurisdiction sought to be reacquired or determined.”²⁵⁰ The bill never made it out of committee, but it could serve as a starting point for congressional action today. The Tribal Law and Order Act of 2010 increased tribal authority in sentencing, thus demonstrating Congress’s support for tribal courts.²⁵¹ It also allows tribes in mandatory P.L. 280 states to request the resumption of concurrent federal jurisdiction under the Major Crimes Act and Indian Country Crimes Act.²⁵² In addition, the Tribal Law and Order Act provides for appointment of tribal prosecutors to enforce federal law in federal courts against Indians and non-Indians alike.²⁵³ While none of these provisions address the problem of unwanted state jurisdiction, it demonstrates federal support for tribal wishes regarding enhanced federal law enforcement.

Another approach short of tribally-mandated retrocession, suggested by Professors Duane Champagne and Carole Goldberg,²⁵⁴ would be to

247. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 782 (2006). Professor Washburn was confirmed by the Senate as the Assistant Secretary of Indian Affairs on September 21, 2012. 158 CONG. REC. S6685 (daily ed. Sept. 21, 2012); Press Release, Dept. of Interior, Salazar Applauds Senate Confirmation of Kevin Washburn as Interior’s Assistant Secretary for Indian Affairs (Sept. 22, 2012), available at <http://www.doi.gov/news/pressreleases/Salazar-Appraises-Senate-Confirmation-of-Kevin-Washburn-as-Interiors-Assistant-Secretary-for-Indian-Affairs.cfm>.

248. Washburn, *supra* note 247, at 853.

249. Indian Law Enforcement Improvement Act of 1975, S. 2010, 94th Cong. (1975).

250. *Id.* § 103(c).

251. See *supra* note 63 and accompanying text.

252. 18 U.S.C. § 1162(d) (2006); see *supra* note 86.

253. 25 U.S.C. § 2810(d) (2006); 28 U.S.C. § 543 (2006).

254. Professors Goldberg and Champagne are two of the leading authorities on P.L. 280 and authors of the only empirical study on the effects of P.L. 280. FINAL REPORT, *supra* note 176.

utilize the Indian Child Welfare Act (ICWA) model, which permits partial retrocession of state P.L. 280 jurisdiction in child custody matters.²⁵⁵ In ICWA, a tribal petition to the Secretary of the Interior initiates the retrocession process and the Secretary has limited discretion to reject the petition.²⁵⁶ Moreover, if a tribal petition is denied, the Secretary must help the tribe cure any defects in the tribal plan to reassume exclusive jurisdiction.²⁵⁷ This is an effective approach as it explicitly targets jurisdiction conferred by P.L. 280 and similar statutes. While the Secretarial-approval role is somewhat paternalistic, the petitioning tribe is generally in control of the process, and Congress provided substantive standards to cabin the Secretary's discretion.²⁵⁸ The affected state has no formal role in the process.

The Indian Gaming Regulatory Act (IGRA)²⁵⁹ provides yet another model for intergovernmental cooperation in general, and respecting P.L. 280 jurisdiction in particular. Under IGRA, casino-style gaming on Indian lands is prohibited unless an Indian tribe has reached an agreement (compact) with the state where the land is located.²⁶⁰ It allows Indian tribes to initiate negotiations in order to reach a tribal-state compact that would govern the terms of the gaming.²⁶¹ If the process

255. *Searching for an Exit*, *supra* note 92, at 268–69. The ICWA of 1978 provides substantive and procedural protection for the benefit of Indian tribes and Indian families. Chief among these are provisions mandating the transfer of child custody proceedings from state to tribal courts at the request of a tribe or Indian custodian. 25 U.S.C. § 1911 (2006); *see* Miss. Band of Choctaw v. Holyfield, 490 U.S. 30 (1989).

256. 25 U.S.C. § 1918 (“Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.”). Implementing regulations are found at 25 C.F.R. pt. 13 (2012).

257. 25 U.S.C. § 1918(c) (“If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.”).

258. *Id.* § 1918(b)(1) (“[T]he Secretary may consider, among other things: (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multiritual occupation of a single reservation or geographic area.”).

259. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–21).

260. 25 U.S.C. § 2710(d)(1). Casino style gaming is defined as “class III gaming” in IGRA. *See* 25 U.S.C. § 2703.

261. *Id.* § 2710(d).

does not yield a compact, a judicially or administratively supervised arbitration process is imposed.²⁶² While this model is not perfect,²⁶³ it has resulted in the greatest economic development in Indian country in the history of the United States.²⁶⁴ The premise of IGRA was that Indian tribes had a right to be free of state jurisdiction with respect to gaming activities. The statute codifies that right while also providing for some state involvement in the way gaming would occur. This has allowed tribes and states to develop relatively harmonious relationships pursuant to these intergovernmental compacts. The statute sets out items that may be included in a compact.²⁶⁵ It also enumerates certain matters that may not be the subject of negotiations, for example, states may not condition their agreement on a tribal concession to state taxation.²⁶⁶ IGRA expressly provides for the “allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of” state or tribal laws directly related to “licensing and regulation of [gaming].”²⁶⁷ The criminal law enforcement provisions of IGRA preempt state gaming laws but authorize compact provisions to make state law applicable.²⁶⁸ Tribal-state compacts in Washington generally provide that Indian tribes shall be the primary enforcement and regulatory authorities respecting Indian gaming, but also authorize state enforcement of some state gambling laws.²⁶⁹ This Article does not

262. *See id.* § 2710(d)(7); 25 C.F.R. §§ 291.7–.11; Final Rule, Class III Gaming Procedures, 65 Fed. Reg. 17,535, 17,536 (Apr. 12, 1999) (explaining process).

263. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding that judicial supervision aspect may be barred by state sovereign immunity because Congress lacks power to waive state immunity pursuant to the Commerce Clause). A regulatory avenue was developed in response to the Supreme Court’s ruling. 25 C.F.R. pt. 291.

264. *See Washburn, supra* note 95, at 422 (“Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of Indian reservations.”).

265. 25 U.S.C. § 2710(d)(3)(C).

266. *Id.* § 2710(d)(4).

267. *Id.* § 2710(d)(3)(C)(i)–(ii).

268. 18 U.S.C. § 1166(d) (2006) (“The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.”).

269. *See, e.g., Tribal-State Compact for Class III Gaming Between the Snoqualmie Indian Tribe and the State of Washington*, § 9, Wash.-Snoqualmie Tribe, Apr. 4, 2002, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Snoqualmie%20Indian%20Tribe/snoqualmiecomp040402.pdf>. All Tribal-State compacts are available from the National Indian Gaming Commission at http://www.nigc.gov/Reading_Room/Compacts.aspx. Washington also has a progressive tribal cross-deputization statute. WASH. REV. CODE § 10.92.020 (2010); *see also supra* note 73.

advocate a P.L. 280 retrocession approach that would require state agreement to remove the state jurisdiction granted by P.L. 280. Rather, the compacting model simply provides an example of tribal-state cooperation in criminal law enforcement matters when such negotiations are authorized under federal law. It is interesting that many of the Washington gaming compacts provide for a limited role of state law enforcement—especially with respect to non-Indians. Presumably, this is because an exclusive tribal and federal regime might create a practical vacuum for minor criminal offenses committed by non-Indians. Tribal criminal jurisdiction over such offenses would be barred by the *Oliphant* rule,²⁷⁰ and prosecution of minor crimes by non-Indians is often a low priority for federal prosecutors, or may fail for other reasons.²⁷¹ A successful negotiation process allows the parties to step back from wooden, doctrinal positions and instead to focus on the substantive law enforcement issues at hand, and how best to implement an effective system in tribal territories.

The foregoing statutory schemes offer useful concepts for tribal removal of unwanted state jurisdiction that should be part of a new approach to P.L. 280 retrocession pursuant to federal law. While imposing state jurisdiction on sovereign tribes without informed consent was bad policy and morally wrong, Congress should not simply oust state jurisdiction unilaterally. Instead, a better approach is one that melds the ideas of encouraging negotiations and compacting as in IGRA, with ultimate power in the tribes to petition the Secretary for a full or partial removal of state jurisdiction as provided in ICWA. Consultation with the affected state should be mandated at a minimal level to encourage intergovernmental cooperation without imposing undue burdens or delay on the petitioning tribe. Authorization of inter-governmental compacts akin to IGRA may not be needed in all states, but if included as an option, it would remove all doubt regarding the possibilities and legality of voluntary intergovernmental arrangements. Time for negotiations allows consideration of reliance interests, which are established by the manner in which law enforcement and service delivery is now carried out by tribal, state and federal authorities. Moreover, the sheer complexity of the P.L. 280 jurisdictional scheme counsels in favor of a deliberate process in which the affected governments can assess the effect of retrocession on their resources and constituents. Any new retrocession process must be developed in consultation with Indian

270. See text at *infra* notes 70–71.

271. Washburn, *supra* note 37, at 713–15.

tribes and affected parties. The purpose of any substantive requirements should simply look to an explanation of how retroceded jurisdiction would be replaced. We live in the era of tribal self-determination. It is time that tribes be given the option to remove that relic of the termination era—P.L. 280.

CONCLUSION

This Article provides the reader with background information in the field of federal Indian law and explains the complexities of criminal jurisdiction in Indian country. It demonstrates that the independence of the Indian tribes at the time of the United States' formation was well accepted, and treaty making with the tribes was consistent with their quasi-independent status after their involuntary incorporation into the United States. The immunity of Indian tribes and their members from state jurisdiction has a pedigree stretching back to the adoption of the Constitution. P.L. 280 altered that situation in a dramatic way by granting states jurisdiction without following the democratic consent principle. As Senator Jackson noted in 1975, “[t]he Public Law 280 legislation was approved by Congress in the face of strenuous Indian opposition and denied consent of the Indian tribes affected by the Act The Indian community viewed the passage of Public Law 280 as an added dimension to the dreaded termination policy.”²⁷²

The complexity that resulted from the ill-conceived grant of authority to the states by P.L. 280 actually decreased the effectiveness of law enforcement in Indian country. The federal government repudiated termination in 1970 in favor of the policy of tribal self-determination, which continues, but P.L. 280's intrusion into Indian country remains. Washington State assumed P.L. 280 jurisdiction in an extremely complex fashion and generally without the consent of Indian tribes. The denial of tribal consent to the jurisdictional scheme on both the federal and state levels is inconsistent with the notion that the consent of the people is a bedrock principle of democracy in the United States.

The Article goes on to describe how Washington developed a state retrocession statute that provides tribes with an innovative avenue to remove unwanted state jurisdiction. Washington's P.L. 280 retrocession law marks a progressive step toward recognizing tribal sovereignty and self-determination, but it does not go far enough because it still denies tribes the power to remove jurisdiction asserted unilaterally. Congress

272. S. COMM. ON THE INTERIOR & INSULAR AFFAIRS, 94TH CONG., BACKGROUND REP. ON PUBLIC LAW 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman).

should consider and pass legislation authorizing tribes to remove state jurisdiction obtained under P.L. 280. Models that vest that power in the tribes, but include opportunities for negotiated cooperative schemes, are set out in the final section of the Article. Such approaches allow Indian tribes the opportunity to develop arrangements that best promote effective justice services and law enforcement in their jurisdictions.